

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

4 RYAN KLAASSEN, et al., ) CAUSE NUMBER 1:21cv00238  
5 Plaintiffs, )  
6 vs )  
7 THE TRUSTEES OF INDIANA )  
UNIVERSITY, )  
8 ) JULY 13, 2021  
Defendant. )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAMON R. LEICHTY

### 13 APPEARANCES:

15 For the Plaintiffs: **MR. JAMES BOPP, JR.**  
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18  
19 For the Defendant: **MS. ANNE K. RICCHIUTO**  
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1                   **THE COURT:** All right. This is **Ryan Klaassen versus**  
2 **the Trustees of Indiana University**, 1:21cv00238. We're here  
3 for purposes of the preliminary injunction motion and argument.

4                   Good afternoon to counsel today.

5                   I see we have Jim Bopp here for the students.

6                   Mr. Bopp, good afternoon.

7                   **MR. BOPP:** Thank you, Your Honor.

8                   **THE COURT:** And also Melena Siebert.

9                   Ms. Siebert, good afternoon.

10                   **MS. SIEBERT:** Yes, Your Honor. Thank you.

11                   **THE COURT:** And then we have Anne Ricchiuto and  
12 Stephanie Gutwein here for the university.

13                   Good afternoon to you both.

14                   **MS. RICCHIUTO:** Thank you for having us. Yes.

15                   **THE COURT:** Mr. Bopp, do you have any of your clients  
16 here for the hearing today?

17                   **MR. BOPP:** I do, Your Honor.

18                   **THE COURT:** Would you like to introduce those  
19 students?

20                   **MR. BOPP:** I'd be pleased to.

21                   Jamie Carini.

22                   **THE COURT:** Ms. Carini, good afternoon.

23                   **MS. CARINI:** Good afternoon.

24                   **MR. BOPP:** Daniel Baumgartener, that is, if you grant  
25 the substitution of his parents.

1                   **THE COURT:** No objection to that, right?

2                   **MS. RICCHIUTO:** Correct.

3                   **THE COURT:** All right. So the Court will grant the  
4 motion to substitute for Mr. Baumgartner and welcome him to  
5 today's hearing.

6                   Good afternoon, sir.

7                   **MR. BAUMGARTNER:** Good afternoon.

8                   **MR. BOPP:** And Margaret Roth.

9                   **THE COURT:** Ms. Roth, good afternoon.

10                  **MS. ROTH:** Good afternoon, Your Honor.

11                  **THE COURT:** All right. Does the university have any  
12 representative present today?

13                  **MS. RICCHIUTO:** We do, Your Honor. We have two of  
14 our counsel. We have Claire McRoberts and Tom Gannon.

15                  **THE COURT:** Mr. Gannon and Ms. Roberts -- McRoberts.  
16 Is it McRoberts or Roberts?

17                  **MS. RICCHIUTO:** Mc, yes.

18                  **THE COURT:** Ms. McRoberts and Mr. Gannon, good  
19 afternoon to you both.

20                  **MS. RICCHIUTO:** Thank you.

21                  **MS. McROBERTS:** Good afternoon.

22                  **THE COURT:** All right. Very good.

23                  All right. With introductions out of the way, just a  
24 couple housekeeping matters on my end before we commence  
25 today's proceeding.

1 I did receive from the parties last week your  
2 stipulation, if I can call it that, concerning an evidentiary  
3 hearing. It seems that the parties are still in agreement that  
4 there's no need to duplicate what you would otherwise or have  
5 already submitted by way of the written record in this case.

6 Is that still the view of the students today,  
7 Mr. Bopp?

8 **MR. BOPP:** It is, Your Honor.

9 **THE COURT:** And for the university, Ms. Ricchiuto?

10 **MS. RICCHIUTO:** Yes, Your Honor.

11 **THE COURT:** All right. I do agree that so long as  
12 counsel are in agreement that the record that I have, which is  
13 extensive, if that were to be merely duplicated by the oral  
14 testimony I would receive today, there's no need to waste  
15 anyone's time in that regard.

16 In terms of the exhibits, let me turn to that subject  
17 now. By my count -- and counsel check me to make sure that I  
18 have my fingers on everything that you have submitted to me, as  
19 there are at least, by my count, more than a hundred  
20 exhibits -- there are Exhibits 100 to 129, 200 to 259, and 300  
21 to 321.

22 Do I have the count right, Mr. Bopp?

23 **MS. SIEBERT:** Yes.

24 **THE COURT:** Ms. Gutwein (sic), thank you.

25 Ms. Ricchiuto?

1 MS. RICCHIUTO: Yes.

2 THE COURT: All right. Have the parties agreed to  
3 the admission of all of these exhibits, Mr. Bopp?

4 MR. BOPP: As far as I know.

5 THE COURT: All right. Any objections to any of the  
6 exhibits that are submitted?

7 MR. BOPP: No.

8 THE COURT: Ms. Ricchiuto?

9 MS. RICCHIUTO: I think, Your Honor, that we don't  
10 want to spend your time today necessarily hashing through  
11 evidentiary objections. I think that what makes the most sense  
12 to me is that they can be stipulated as to admissibility, and  
13 then obviously Your Honor can give them whatever weight you  
14 deem appropriate. That seems like the most efficient way to  
15 handle it to me.

16 THE COURT: All right. So all those exhibits are  
17 admitted. And, yes, you're right. I will ultimately decide,  
18 once I've reviewed them all, what weight to give the various  
19 exhibits. And I realize there is much in the way of deposition  
20 testimony in there, too.

21 It occurred to me, as I started to review these  
22 yesterday afternoon and last evening, that there are some  
23 duplicates in here. I think counsel made an effort to try to  
24 streamline some of these exhibits to correspond perhaps with  
25 your presentation today, so I recognized that there were some

1 duplications -- "excerpting" perhaps is the better word -- and  
2 I took that into account as I was reviewing.

3 I have, just so the parties are aware, read all your  
4 briefs. I am familiar with the law. I have reviewed a great  
5 mass of the exhibits and deposition testimony. I must confess,  
6 I have not reviewed it all thus far. But I was up until the  
7 wee hours of the morning last night reviewing as much as I  
8 could take before I had to sleep, and then I reviewed some more  
9 this morning.

10 So if there are -- I say that only to share with you  
11 that if there are particular excerpts that you think are  
12 important, say in the deposition testimony or in these  
13 PowerPoint presentations or in the medical studies or the  
14 declarations from either Dr. McCullough or Dr. Beeler, it would  
15 be helpful that you point those out to me to facilitate my  
16 review today. But I have waded through a great majority of the  
17 exhibits at this time.

18 All right. Other than the motion to substitute,  
19 which I've already granted, that's all I had on my agenda,  
20 other than to set out a plan for today's hearing, in light of  
21 the fact that we are going to hear argument and no new  
22 evidence.

23 Mr. Bopp, how much time were you anticipating needing  
24 for your remarks?

25 **MR. BOPP:** An hour, and I'd like 20 minutes for

1 rebuttal.

2 **THE COURT:** All right. Ms. Ricchiuto?

3 **MS. RICCHIUTO:** I don't exactly know what Jim's going  
4 to say, but I've got a pretty good idea, so I think probably  
5 roughly an hour is going to be sufficient for me, as well.

6 **THE COURT:** All right. I'll give both sides an hour  
7 and 20 minutes. I'll give you an hour on the open and 20  
8 minutes in rebuttal. I gave you a little extra time there only  
9 because I probably will have some questions along the way. And  
10 so to the extent I interfere with your otherwise prepared  
11 remarks, you should still have sufficient time to get through  
12 everything today.

13 All right. That's all I had on my agenda.

14 Mr. Bopp, anything else by way of preliminary matters  
15 before we begin?

16 **MR. BOPP:** Nothing else, Your Honor.

17 **THE COURT:** Ms. Ricchiuto, anything else for the  
18 university?

19 **MS. RICCHIUTO:** No, Your Honor.

20 **THE COURT:** All right. Mr. Bopp, it's your motion.

21 **MR. BOPP:** Thank you, Your Honor.

22 May it please the Court.

23 First, thank you for accommodating the expedited  
24 nature of this case. I know it's an imposition, and we  
25 appreciate you addressing these matters in an expedited way.

1 I have already introduced the students. But since  
2 we've referred to them as students, I'd like to also note that  
3 they're adults. Many times we think of students as children,  
4 but these are college-age students. All the plaintiffs now, as  
5 of Sunday, reached the age of majority. And the vast majority  
6 of students at Indiana University are all adults. So we really  
7 don't think we have the need to discuss the authority of a  
8 college or a school in a parents' capacity because these are  
9 adults.

10 First, I'd like to start with the context in which  
11 this mandate was issued.

12 First, the mandate was issued contrary to the  
13 emergency use authorization by the FDA. That authorization  
14 specifically requires that the provider do two things pertinent  
15 to this. One is provide informed consent; and, two, provide to  
16 the patient "option to accept or refuse" the vaccination. And  
17 that's kind of inherent in the nature of this authorization and  
18 doesn't really exist with respect to other forms of  
19 authorization. And, of course, that legal requirement does not  
20 apply to IU -- certainly they're not a health care provider in  
21 this context -- but it obviously is contrary to that and  
22 certainly to the policy under which vaccines such as this are  
23 authorized.

24 Second, it is contrary to modern medical ethics. One  
25 of the principal developments over the last several decades in

1       ethics has been the concept of voluntary, informed consent for  
2       medical treatment of any kind, including whether it's research  
3       or provision of normal medical care.

4               There are historical examples when this has not taken  
5       place, and we in this modern era have rejected that, that  
6       people can be required to take or unknowingly take medicines or  
7       engage in research or anything without their knowledge and full  
8       informed consent.

9               Of course, the mandate prohibits that consent, except  
10      conditioned on, as I will get to, a severe punishment if the  
11      person does not consent.

12               Third is contrary to any vaccinations that have been  
13      historically required in three different ways.

14               First, the vaccinations currently required and  
15      historically required have had decades of use so that the risks  
16      were known, if there were any. And that takes you to the  
17      second part, is none of these required vaccinations really have  
18      any side effects except extremely, extremely rare. And they  
19      are also given and prescribed to a vulnerable population. In  
20      other words, those that are required for children when they go  
21      to elementary school are all diseases that particularly  
22      adversely affect children. So there is a -- they're a very  
23      vulnerable population to the disease.

24               Of course, we're going to talk about **Jacobson**, but  
25      the context of **Jacobson** in 1904 was the smallpox epidemic. And

1 the smallpox epidemic was -- smallpox was very virulent. And  
2 from 1900 to 1976 when it was eradicated, finally, mercifully,  
3 200 million people in the world died in that time period  
4 because of that disease.

5 Now, as bad as COVID is -- and we agree it is bad.  
6 We agree that it was a pandemic. We agree at the beginning  
7 that stern measures were required, and in fact there was a  
8 compelling interest at the beginning of this pandemic -- but,  
9 so far, worldwide, four million people have died. So we have  
10 orders of magnitude which -- and, of course, we have a much  
11 larger population than they did in 1904. So the rate -- the  
12 death rate of smallpox is astronomically larger worldwide than  
13 the death rate of COVID.

14 Now, furthermore, the vaccine had been around for  
15 decades and had been developed by -- it was found that another  
16 form of pox called cowpox -- if a person had had cowpox, which  
17 is a much, much milder form of pox, would be also immune from  
18 smallpox. So based on that, they developed a way of infecting  
19 people with cowpox. In fact, when I was young, that happened  
20 to me. I still have the scar to prove it. And so that is how  
21 it was developed, and it has basically no risk. And, of  
22 course, smallpox was -- in fact, the whole population was  
23 vulnerable to smallpox. So that's an example of such a  
24 development.

25 Now, next, the mandate is contrary to CDC

1 recommendations. The CDC certainly recommends, as they should,  
2 vaccines, and we would recommend them. But they do not mandate  
3 them. They do not -- they do not recommend or suggest that  
4 they ought to be mandated to any part of the population, much  
5 less the least vulnerable, which, as I will describe, are  
6 college children. And college-age people are the least  
7 vulnerable. Those that are the most -- it goes up by age, in  
8 fact geometrically goes up by age in terms of the adverse  
9 effects of COVID if you get infected, until those over 85 have  
10 a minimum of a 600 times greater risk of mortality and  
11 morbidity from a COVID infection than do college students. But  
12 nobody recommends they be mandated to be vaccinated.

13 It is also contrary to every state in the United  
14 States, every county in the United States, and every city in  
15 the United States that has issued any mandates regarding COVID.  
16 None of them mandate any part of the population be vaccinated  
17 at all.

18 Now, it is true, there are a few universities that  
19 do, and there are a few employers that do. That is contrary to  
20 all the Indiana state universities. No other state university  
21 in Indiana mandates a COVID vaccination. Notre Dame does.  
22 They're a private university. They're in a different posture.  
23 But no public university in Indiana does so, including most  
24 recently Purdue that has lifted all restrictions. So has the  
25 State of Indiana virtually lifted all restrictions. So has the

1 vast majority of counties and cities, have lifted nearly  
2 every -- not necessarily every, but the vast majority of  
3 restrictions, because all of them recognize that we're at the  
4 end stage of the pandemic where these sort of -- that would  
5 otherwise be viewed as harsh measures, restrictive measures,  
6 rights-violating measures are not being employed. In fact,  
7 they're being lifted uniformly throughout the country.

8 **THE COURT:** But not yet?

9 **MR. BOPP:** I'm sorry?

10 **THE COURT:** But not yet, right? The State of Indiana  
11 is not yet there. They've not lifted all restrictions,  
12 correct?

13 **MR. BOPP:** Well, they did lift a whole bunch of them  
14 in the last -- the issuance of the last emergency order.

15 **THE COURT:** The State of Indiana has not lifted all  
16 restrictions, correct?

17 **MR. BOPP:** No. They have still some, but they're  
18 very narrow. They lifted the mask mandate, social distancing  
19 mandate, you know, the ones trying to stem the progress of the  
20 disease, and they're very limited. And we set those out in our  
21 brief.

22 **THE COURT:** And from the federal perspective, the  
23 Secretary of Health and Human Services declaration of a public  
24 health crisis hasn't been rescinded at this time, right?

25 **MR. BOPP:** Not that I know of.

1                   **THE COURT:** So that's still in effect, as well?

2                   **MR. BOPP:** Yes, but it doesn't require -- it doesn't  
3 mandate vaccination, which is pertinent to this.

4                   **THE COURT:** Well, I appreciate that. But the notion  
5 that we are completely out of the woods hasn't been recognized  
6 by either the highest authority here in the State of Indiana,  
7 or one of the highest authorities in the State of Indiana, nor  
8 by the authority on the federal government side who deals  
9 specifically with these types of health issues, correct?

10                  **MR. BOPP:** Well, yes. We're not -- it hasn't been  
11 eradicated. That's true. COVID has not been eradicated.  
12 However, as I will soon demonstrate to you, we are in an end  
13 stage of the pandemic. We're not saying we're out of the  
14 pandemic, but we're at the end stage. And you will soon see  
15 the CDC recommendations that explain what should be done in a  
16 situation like we find ourselves.

17                  In other words, there are different measures that are  
18 recommended based on the stage of the pandemic. You know, you  
19 first find out about it, the recognition stage; then the  
20 acceleration stage; and then the deceleration stage; and then  
21 IU calls it, as you will soon see, the recovery stage. The CDC  
22 calls it the transition stage. And it's much different in  
23 terms of the response that is recommended and that IU's policy,  
24 which unfortunately they didn't implement, recommends, as well.

25                  Now, there are legal limits to IU's authority.

1 They're the government, and they're not a private university,  
2 so the Constitution applies to them. And they're not dealing  
3 with children; they're dealing with adults at the university.  
4 And so their legal limits, in terms of what rights they can  
5 violate, are limited by due process of law.

6 Now, IU, however, claims nearly unreviewable  
7 authority to mandate vaccinations and other health measures  
8 that they, in their judgment, think they are to do, and that's  
9 regardless of whether we're in a pandemic or not. They claim  
10 this authority every day, all day, for the rest of the time of  
11 the world, regardless of the situation, even if there's a  
12 pandemic that they're trying to address.

13 That sweeping level of authority is so contrary to  
14 modern constitutional jurisprudence, it's breathtaking. What  
15 government agency would ever make such a claim and believe that  
16 they can willy-nilly violate rights and never be reviewed and  
17 never have to demonstrate that there's any justification for  
18 what they do?

19 And that is even under **Jacobson**, because there's an  
20 exception to **Jacobson** -- there's an exception in **Jacobson** that  
21 we think is applicable here, and I'll soon describe that.

22 So the task for this Court is to look at the current  
23 situation, not add up all the deaths of a pandemic that has  
24 gone like this, and now we're down here, but look at the  
25 current situation and whether or not their mandate, which is

1 brand-new, is justified by the circumstances under the  
2 appropriate level of scrutiny.

3 Now, we do know some things now that we didn't know a  
4 year-and-a-half ago about the COVID virus, its risks, its  
5 treatment, and the progress of the disease in the United  
6 States, State of Indiana, and at IU. Well, these are all  
7 things that the Court, in our opinion, must take into account  
8 to determine whether or not, under the circumstances, the  
9 vaccine mandate is required.

10 Now, the first thing we know is it affects age groups  
11 differently, is that the youngest are the least affected, the  
12 oldest are the most affected. But it isn't just, you know,  
13 like a little bit. It is astronomically different.

14 I tendered to the Court our exhibits that I was going  
15 to refer to in this presentation.

16 **THE COURT:** Mr. Bopp, are these the handouts we got  
17 this afternoon?

18 **MR. BOPP:** Yes.

19 **THE COURT:** All right.

20 **MR. BOPP:** Yes.

21 Yeah, I had to kill more trees.

22 So, anyway, if you look at -- if you look at what is  
23 Exhibit 243 -- and I hope it's on the top.

24 **THE COURT:** It is.

25 **MR. BOPP:** Okay.

1 -- you will see, on the upper left-hand corner, in  
2 November of 2020, the CDC estimate of the infection fatality  
3 ratio for the coronavirus. And you will see different rates at  
4 ages 20 to 49, and then they have at 70. Well, the difference  
5 in the rate -- and they're talking about death rate here -- is  
6 that those in the age group above 70 have a 2,700 times greater  
7 risk of death than those in the 20 to 49, so we're talking  
8 astronomical differences.

9 Now, Dr. Carroll in his deposition agreed that the  
10 number 600 times -- he would agree to the number 600 times  
11 between college-age students and people over the age of 85. He  
12 would agree 600 times greater risk of adverse effect.

13 Now, you can also look at this in absolute terms. We  
14 presented a study of -- I forget now how many -- 50 or so  
15 colleges, maybe more, and what the study found was one death  
16 and 17 hospitalizations in the last year-and-a-half of  
17 college-aged students from the COVID infection.

18 At IU, Dr. Carroll agreed that there was, they  
19 believe, one death of IU students -- of an IU student in the  
20 last year-and-a-half from the COVID infection.

21 THE COURT: And how many hospitalizations?

22 || MR. BOPP: I don't know. I don't know.

23 And, of course, these numbers can be compared with  
24 things like homicides, you know, for the last -- for a year in  
25 this group, and that's 146; suicides, 143 -- and this is just

1 for a year -- inflammatory heart, 13; congenital abnormalities,  
2 11. So we're talking about, in either relative terms or in  
3 absolute terms, something that is extremely rare, extremely  
4 rare.

5 IU has 90,000 students, 90,000, in all of its  
6 campuses, and --

7 **THE COURT:** Do we know the statistics related to IU's  
8 experience for its other community members? You know, this is  
9 not just about students, but there are faculty and staff and  
10 employees who work at Indiana University who, every day, come  
11 in contact with students.

12 **MR. BOPP:** Right.

13 **THE COURT:** So what is the experience vis-a-vis the  
14 entire community at Indiana University and its campuses?

15 **MR. BOPP:** Well, I don't know about faculty and  
16 students -- I mean faculty and staff. I am not representing  
17 them. I didn't --

18 **THE COURT:** Shouldn't I consider that evidence, as  
19 well, in running the calculus here, the constitutional  
20 calculus?

21 **MR. BOPP:** Well, students are close -- they're more  
22 close -- well, it depends on what you're thinking about. If  
23 you're thinking about students need to be vaccinated in order  
24 to protect other people, all right, well, I asked Dr. Carroll  
25 about that -- he was the 30(b) (6) witness for Indiana

1 University -- and he said it's not the purpose of this mandate  
2 to protect these other people. The purpose is to protect IU  
3 students; and that if other people in the community are  
4 protected, well, that's a beneficial collateral effect, if that  
5 is the case. But that is not the purpose of this. This is to  
6 protect people in the IU community, which includes faculty and  
7 staff, all to be vaccinated.

8 Now, the only other thing I know I could tell you  
9 about is the vaccination rate among IU students is 75 percent  
10 as of June of this year, and that was right after the mandate  
11 was issued, that figure arose, and it was -- and, of course,  
12 they -- of course, then, you know, campus was emptied out  
13 because of Summer.

14 I understand that faculty and staff have a higher  
15 vaccination rate than do the students. That's what I  
16 understand. But, believe you me, I had enough to do than try  
17 to figure that out.

18 All right. Now, second, the vaccination risk for the  
19 population and for college -- there is a vaccination risk for  
20 the population and for college-age students. And it appears,  
21 even though, you know, things are just emerging, that they seem  
22 to be at greater risk of an adverse effect than the general  
23 population. So we may have an inverse in terms of the effect  
24 of the vaccination. Rather than the fact of the adverse events  
25 affecting older people more, it seems it is affecting younger

1 people more.

2                   And if you'll turn to the next exhibit, 257, you will  
3 see, as of July 9, they report it through the VAERS system,  
4 which is very well recognized, even though it has its  
5 limitations, a system that has reported both various adverse  
6 reactions and effects to 18 to 29-year-olds at the top,  
7 including one death -- and this is in Indiana -- and at the  
8 bottom is all ages in Indiana, and they report 123 deaths.

9                   So there are known adverse effects to this vaccine,  
10 as opposed to the other vaccines I described. I mean, as a  
11 result, you know, there is a risk/benefit analysis that needs  
12 to be done for anyone who is allowed to make a decision, to  
13 give informed consent, to being vaccinated.

14                   Now, another interesting statistic is that heart  
15 inflammation has recently emerged, that college-age men  
16 predominantly are having a reaction, which is a heart  
17 inflammation. And for those that are 12 to 24 -- you know,  
18 everybody does their statistics with different age ranges,  
19 unfortunately -- for that age group, they have received 8.8  
20 percent of all vaccines and, however, have suffered 52 percent  
21 of the heart inflammation.

22                   **THE COURT:** So is there any -- Mr. Bopp, is there any  
23 authoritative peer-reviewed study that establishes a causative  
24 link between the vaccine, any one of the vaccines approved  
25 under EUA and heart inflammation?

1                   **MR. BOPP:** Not yet.

2                   **THE COURT:** So the evidence we have today -- and I  
3 realize that, much like the pandemic, the science as it  
4 concerns COVID-19 and the vaccines is ever-evolving. What we  
5 know today won't be what we know in 20 years -- but at least as  
6 to what we know today, the evidence that associates a link  
7 between heart inflammation and any one of the COVID-19  
8 vaccinations is anecdotal?

9                   **MR. BOPP:** Yes.

10                  Now, there is -- and we have in our exhibits --  
11 Hill's Causation, and it's well accepted.

12                  **THE COURT:** It goes through several factors as to how  
13 you go about determining causation?

14                  **MR. BOPP:** Exactly.

15                  And, of course, those that have used that, okay, see  
16 a link, all right.

17                  **THE COURT:** And one of those is temporal association?

18                  **MR. BOPP:** Right.

19                  **THE COURT:** Which is, in large measure, what this  
20 anecdotal information is based on; do you agree?

21                  **MR. BOPP:** In part, yes.

22                  **THE COURT:** In other words, when there are reports in  
23 the VAERS system, that is anecdotal evidence largely based on  
24 this time association, the temporal association?

25                  **MR. BOPP:** Uh-huh. That's one of the factors that is

1 considered.

2 And, you know, of course, as we know, which bears on  
3 the reasonableness of their mandate, this was emergency-use  
4 authorization, was how this was approved. There weren't  
5 long-term studies, even though they are being done now and  
6 should be done by 2023. We will, I'm sure, know a lot more.  
7 And we have seen in real time, you know, how the use of a  
8 particular drug -- you know, as you go along in time, you find  
9 out things. Because the heart inflammation association was not  
10 even suspected and wasn't manifest at the beginning, you know,  
11 say six months ago when they started using the vaccine. But  
12 now it's emerging, and there are other problems emerging. I  
13 don't want to say anything about it because I just heard it on  
14 the news, but there's another concern about Johnson & Johnson  
15 on causing an autoimmune disease. That's all I know. But  
16 that's one of the realities of what we are dealing with, which  
17 surely is why everyone else in the United States is not  
18 mandating these vaccinations, you know, and letting people make  
19 a choice, not assume risks by government mandate.

20 **THE COURT:** Don't the students have a choice here?

21 **MR. BOPP:** I'm sorry, sir?

22 **THE COURT:** Don't the students have a choice here?

23 **MR. BOPP:** Not --

24 **THE COURT:** They can attend Indiana University and  
25 receive the vaccine, save for certain exemptions, which I'm

1 sure we'll get into, or they can attend university elsewhere.

2 **MR. BOPP:** Yeah. That's IU's argument, of course.

3 And, of course, the problem with that is the Unconstitutional  
4 Condition Doctrine that establishes that, if the government  
5 conditions a benefit, and the benefit doesn't -- you know, you  
6 don't have to be entitled to it in any way, in fact you don't  
7 even have to violate your rights, in order to assert that, if  
8 the government conditions a benefit on the waiver of a  
9 constitutional right, that that itself is a violation of that  
10 right.

11 Of course, **Regan versus Taxation Without  
12 Representation** was well-known. The **Koontz** case recently  
13 decided by the court lays out all the cases. That was an  
14 opinion by Justice Alito that we cite in our brief -- in our  
15 reply. It lays out the entire legal theory under which  
16 conditioning a benefit on waiver of a constitutional right is  
17 itself a violation of that right.

18 **THE COURT:** And, of course, in running that analysis,  
19 we have to then define what the right is, right?

20 **MR. BOPP:** Yes.

21 **THE COURT:** So what is the right here?

22 **MR. BOPP:** To bodily integrity; to medical treatment  
23 choice; and, in a couple of cases of our plaintiffs, to free  
24 exercise of religion.

25 **THE COURT:** Well, the free exercise of religion, to

1 be clear, concerns the face mask mandate, right?

2 I mean, there's two issues here. There's one related  
3 to whether they have to take the vaccine, subject to certain  
4 exemptions; and then there's the additional requirements?

5 **MR. BOPP:** Right.

6 **THE COURT:** And I realize the university has an  
7 argument about whether those are really here in the case or  
8 not. Mr. Bopp says they are, so I'm entertaining that.

9 So with respect to religious rights, that concerns  
10 the face mask and the other additional requirements, right?

11 **MR. BOPP:** Yes. In other words, they are not getting  
12 a true religious exemption because they have to now comply with  
13 a second set of requirements that violates their religion, and  
14 they can't get a waiver for those.

15 **THE COURT:** Right.

16 So coming back then to the vaccination -- I want to  
17 focus on that, Mr. Bopp -- if we run the analysis under the  
18 Unconstitutional Conditions Doctrine, we're really focused on  
19 what specific right?

20 **MR. BOPP:** Well, I say all three of the ones are at  
21 issue: Bodily integrity; medical treatment choice; and  
22 religious freedom, in some instances.

23 Now, bodily integrity --

24 **THE COURT:** But there's a religious exemption. I'm  
25 not sure I see why the religious choice, the exercise of

1 religious choice, bears on the vaccination when there is an  
2 exemption under this policy for --

3 **MR. BOPP:** But there's not an exemption to all the  
4 religious objections.

5 See, this is like saying, you know, to a Muslim,  
6 "We're not going to exclude you from our restaurant," okay,  
7 "but we're going to make you eat pork if you come in," okay.

8 In other words, yeah, the initial requirement they're  
9 exempted from. But what is imposed upon them is an equally  
10 offensive violation of their religious beliefs that they cannot  
11 get an exemption for, which means --

12 **THE COURT:** Wearing a mask?

13 **MR. BOPP:** Yeah.

14 -- which means that the exemption is phony. It's not  
15 for religious objections. It's only for certain religious  
16 objections.

17 And you can look at it another way. Have you ever  
18 heard of a religious objection in which additional requirements  
19 are imposed upon you that nobody else has to comply with? So,  
20 I mean, I call that a penalty. You're being penalized for  
21 getting an exemption.

22 **THE COURT:** What you call a penalty one might say is  
23 enabling?

24 **MR. BOPP:** Is what?

25 **THE COURT:** Enabling. In other words, it's a

1 benefit. This is a mechanism by which the university allows  
2 people to exercise their religion.

3 **MR. BOPP:** Well, number one, you cannot condition a  
4 benefit like going to the university on wearing a mask if it  
5 violates your rights, and I'm explaining how it does, religious  
6 right, and so --

7 Anyway, I'm losing my train of thought, where we're  
8 at now, but --

9 **THE COURT:** Well, let me take you back to where I  
10 started. I'll help you here. This is the unconstitutional  
11 conditions analysis.

12 **MR. BOPP:** Uh-huh.

13 **THE COURT:** Let's focus on -- outside of the  
14 religious freedom context, let's focus on this right to bodily  
15 autonomy and the right to choose medical treatment or not.

16 **MR. BOPP:** Uh-huh. Sure.

17 **THE COURT:** Based on the law to date, nowhere does  
18 the Constitution say that there is a fundamental right, or even  
19 a right in that regard, though it has been recognized as a  
20 liberty interest under the case law, at least assumed as one  
21 under **Cruzan**, under **Glucksberg**, right? There are certain cases  
22 that have recognized, or at least assumed, that that right has  
23 existed as a liberty interest that then is protected by the due  
24 process clause of the Fourteenth Amendment. Do you agree?

25 **MR. BOPP:** Right. And under a liberty interest, it

1 would be subject to rational basis, which requires  
2 justification and evidence and everything that IU says they  
3 don't have to provide.

4 **THE COURT:** So let me make sure I understand this  
5 right, Mr. Bopp.

6 So you agree that, under that analysis, that gets us  
7 to rational basis review; it doesn't get us to strict scrutiny?

8 **MR. BOPP:** Well, I think -- no, I didn't mean that.  
9 I think that a violation of bodily integrity requires strict  
10 scrutiny.

11 **THE COURT:** Okay. You're going to have to help me  
12 get there, because what I'm reading in terms of **Glucksberg** and  
13 **Cruzan** and --

14 **MR. BOPP:** Those are the medical treatment cases.

15 **THE COURT:** Sure.

16 **MR. BOPP:** I'm talking about -- I'm talking about  
17 contraceptives, abortion, those lines of cases, where bodily --  
18 you know, the right to do with your body as you choose. I  
19 mean, that's the way people --

20 **THE COURT:** So you want me to -- you want me to  
21 expand the substantive due process rights that are recognized  
22 today to make a new one?

23 **MR. BOPP:** No. No, but the bodily integrity right  
24 has been recognized --

25 **THE COURT:** As a liberty interest, not as a

1 fundamental right.

2 **MR. BOPP:** Only in the -- well, what I'm saying --

3 **THE COURT:** Is that correct?

4 **MR. BOPP:** No.

5 Abortion --

6 **THE COURT:** What case has recognized it as a  
7 fundamental right, the right that you want to assert here today  
8 on behalf of the students?

9 **MR. BOPP:** The line of cases starting with  
10 **Roe v. Wade** is one, and that is --

11 **THE COURT:** Well, let's be very clear, Mr. Bopp. The  
12 Supreme Court has been very specific about this. When we look  
13 in the penumbra of substantive due process to determine what  
14 rights exist there, that the right has to be clearly,  
15 specifically defined.

16 **MR. BOPP:** Uh-huh.

17 **THE COURT:** It's not enough to say, "Well, there's a  
18 right to private decisions within your home, and therefore  
19 there is now this right to refuse a vaccine," right. You agree  
20 with me; the case law doesn't make that leap or allow that  
21 leap? Instead, when we're dealing with substantive due  
22 process, we have to clearly define the right that we're going  
23 to wrestle with today.

24 **MR. BOPP:** Understood, and that -- and that is the  
25 application -- that would be an application of the -- of

1 general rights, I agree; that you have to define properly the  
2 application of that right; and then at that level of  
3 specificity, the Courts determine whether or not it fits and is  
4 fundamental.

5 **THE COURT:** So my question is a precise one.

6 **MR. BOPP:** Uh-huh.

7 **THE COURT:** The Bill of Rights were ratified in 1791.  
8 The Fourteenth Amendment is approved in 1868.

9 Since that time, has there been a single case  
10 anywhere in the country that has recognized the right that you  
11 want to assert on behalf of the students as a fundamental  
12 right?

13 **MR. BOPP:** You know, the best I can do is what we did  
14 in our brief, Your Honor, and we cited specific cases we  
15 believe establish that --

16 **THE COURT:** Again, I want a specific answer to my  
17 question, Mr. Bopp.

18 Is there --

19 **MR. BOPP:** I don't --

20 **THE COURT:** No. Excuse me, sir.

21 **MR. BOPP:** Sorry.

22 **THE COURT:** Is there a single case that has  
23 recognized the right, this right, the right to not just bodily  
24 autonomy to refuse the vaccine --

25 **MR. BOPP:** Vaccines?

1                   **THE COURT:** Yes, sir.

2                   -- as a fundamental right?

3                   **MR. BOPP:** There's been two cases that address this  
4 by the United States Supreme Court, and they were in 1904,  
5 **Jacobson**, and then they were in -- and then the **Zucht** case,  
6 Z-U-R-K (sic), I think it is, that specifically upheld  
7 vaccination requirements for school-aged, meaning elementary or  
8 high school or whatever, not college.

9                   And those --

10                  **THE COURT:** And if we go back to **Jacobson** --

11                  **MR. BOPP:** Yeah.

12                  **THE COURT:** -- **Jacobson** is just a rational basis  
13 review case by another name, is it not, in effect a precursor  
14 to rational basis, before rational basis was known as it's  
15 constitutionally known today in terms of the modern tiers of  
16 scrutiny?

17                  **MR. BOPP:** As one judge said it, **Jacobson**'s exception  
18 is analytically different but gets you to the same place as  
19 rational basis, because under the exception, the government has  
20 to recognize that the requirement is not unreasonable and that  
21 there's a sufficient connection between the requirement and  
22 public safety that it can be upheld, and that is if there's a  
23 right violated. And, of course, **Jacobson**'s central holding was  
24 there weren't any rights violated and therefore you can just  
25 willy-nilly do this.

1                   But, you know, since 1904, I mean, my goodness sakes,  
2 look at the whole line of cases that have, you know, harkened  
3 back to dissents, you know, the right to be left alone, things  
4 like that, and we have right now a very fulsome set of  
5 constitutional principles that establish rights. Sometimes --  
6 and what we're talking about right now is like a new  
7 application of an enduring, well-recognized principle. And  
8 there is -- other than those two cases in the Progressive Era,  
9 there's just, you know, nothing else to point to as far as the  
10 Supreme Court is concerned.

11                  **THE COURT:** So, Mr. Bopp, I may well agree that  
12 there's a well recognized, at least in the case law that has  
13 built on the concept of substantive due process, liberty  
14 interest in bodily autonomy, the right to refuse unwanted  
15 medical treatment, even a case that recognized that liberty  
16 interest in refusing anti-psychotic drugs in the prison  
17 context, right. There are a line of cases that recognize that  
18 as a liberty interest. I'm trying to get clarity as to whether  
19 there's any authority for recognizing it as so fundamental that  
20 we now leap into strict scrutiny.

21                  Recognizing that as a liberty interest, like  
22 **Glucksberg** did, I think, led the Court to a rational basis  
23 review, did it not?

24                  **MR. BOPP:** Arguably.

25                  **THE COURT:** Sorry?

1                   **MR. BOPP:** Arguably, yes.

2                   **THE COURT:** I mean, that was the conclusion of the  
3 case, that there was a legitimate interest that the, I think,  
4 State of Washington was pursuing that was rationally related to  
5 that interest, that is, the law that was passed that prohibited  
6 assisted suicide.

7                   **MR. BOPP:** Often they default to rational basis even  
8 though it could be subject to scrutiny because they want to do  
9 it at, you know, the lowest level. And if it won't even pass  
10 rational basis, why do we have to think about strict scrutiny?

11                  You know, I do understand that dynamic in the courts,  
12 and that, I think, has resulted in the default in some of these  
13 cases, including **Glucksberg**, to a rational basis review,  
14 because if it won't pass that, it certainly is not going to  
15 pass strict scrutiny.

16                  **THE COURT:** That doesn't really answer the question  
17 for us in terms of **Glucksberg**, because they said it did pass  
18 rational basis review in **Glucksberg**, the law that was passed by  
19 Washington, right?

20                  **MR. BOPP:** Right.

21                  **THE COURT:** So who knows what the analysis might have  
22 been had strict scrutiny been appropriate.

23                  **MR. BOPP:** Sure.

24                  **THE COURT:** So my question is one aimed at: What is  
25 the right constitutional analysis that needs to be employed

1 here?

2 And I know I'm pressing you with questions, but I'm  
3 not sure I'm seeing the case for why strict scrutiny applies as  
4 opposed to rational basis.

5 **MR. BOPP:** Well, you have to determine the  
6 seriousness of the intervention, because it is recognized as at  
7 least a liberty interest, and you have to understand the  
8 seriousness of it.

9 And we have plaintiffs who -- their attending  
10 physician has told them that their underlying medical  
11 conditions mean that they are at serious risk to their health  
12 or life if they take the vaccine and so don't take it. That  
13 plaintiff sought a medical exemption and was refused it.

14 **THE COURT:** You're talking about Ms. Carini?

15 **MR. BOPP:** I'm currently thinking about Jaime Carini.

16 **THE COURT:** Ms. Carini?

17 **MR. BOPP:** Yeah.

18 **THE COURT:** So Ms. Carini has a religious exemption?

19 **MR. BOPP:** Yes.

20 **THE COURT:** Which she received prior to the time that  
21 that she sought a medical exemption?

22 **MR. BOPP:** Yes.

23 **THE COURT:** All right. So she had already an  
24 exemption and went after a second exemption?

25 **MR. BOPP:** Yes.

1                   **THE COURT:** Are there any students among the eight  
2 who are plaintiffs in this case who have a doctor's opinion or  
3 a doctor's note who says they should not get the vaccine?

4                   **MR. BOPP:** There's two of them.

5                   **THE COURT:** Other than Ms. Carini, who has already  
6 got an exemption, who else is there?

7                   **MR. BOPP:** Do you remember?

8                   **MS. SIEBERT:** Hold on.

9                   **MR. BOPP:** We'll have that answer for you.

10                  **THE COURT:** Sure. Thank you.

11                  **MR. BOPP:** Let me finish up the thought about the  
12 risk of vaccine, the COVID vaccine versus others.

13                  We cite a study which compared the number of  
14 COVID-related deaths in the six months the vaccines have been  
15 utilized throughout the United States, and that's 6,136, with  
16 the total number of deaths for all other vaccinations,  
17 vaccines, for the last 20 years, all right, and that number is  
18 half of what the COVID wracked up -- COVID vaccine wracked up  
19 in six months, and that number is 3,167. Adjusted per year --

20                  **THE COURT:** 3,167 deaths?

21                  **MR. BOPP:** Deaths.

22                  **THE COURT:** Based on what study?

23                  **MR. BOPP:** We cite it in our --

24                  **THE COURT:** Is this the abstract?

25                  **MR. BOPP:** Yes. I don't have -- I didn't pull it out

1 to show you.

2 **THE COURT:** So I read last night an abstract --

3 **MR. BOPP:** Yeah.

4 **THE COURT:** -- which I presume is not peer-reviewed,  
5 correct?

6 **MR. BOPP:** I'm not sure which one you're referring  
7 to.

8 **THE COURT:** Okay. Well, let's be specific so when I  
9 looked at the evidence, you know, after today's hearing I'm on  
10 the same page with you, Mr. Bopp.

11 **MR. BOPP:** Sure.

12 **THE COURT:** But there was an abstract that was based  
13 on an analysis of the VAERS data.

14 Is that the one that you're referring to?

15 **MR. BOPP:** Yes.

16 **THE COURT:** Okay. And that's an abstract? It was  
17 not peer-reviewed, correct?

18 **MR. BOPP:** That's correct. I now know what you're  
19 asking me about.

20 **THE COURT:** Okay. And that's based on the VAERS  
21 anecdotal data?

22 **MR. BOPP:** True.

23 **THE COURT:** So it's not a study?

24 **MR. BOPP:** Well, true. There are limitations on the  
25 VAERS data. It's passive reporting. It's self-reporting,

1 usually by health care providers, sometimes by laypeople. But,  
2 you know, all the experts in the field rely upon this  
3 information. And it's not -- certainly not perfect, that's for  
4 sure.

5 **THE COURT:** Well, I saw that the authors of that --

6 **MR. BOPP:** By the way, could I finish that?

7 There are people -- there is, I think -- I am trying  
8 to remember. It might be the CDC that does follow up on these  
9 reports to try to verify them, but they don't -- but the  
10 results of that investigation is not then reflected in the  
11 VAERS data. It's still the raw data.

12 **THE COURT:** And I'm not dismissing the fact that  
13 temporal association may be the beginnings of a causative link.

14 **MR. BOPP:** Right.

15 **THE COURT:** But I'm focused particularly on this  
16 abstract.

17 I noted that the authors there noted a couple of  
18 things. First, that, in large measure, this anecdotal  
19 information was shared, I would say, by the majority, or in the  
20 majority, by health care professionals, as you've said. And,  
21 second, then they draw a conclusion that there is a link  
22 between the vaccines and the risk of death. What was not clear  
23 to me in reading the abstract was how they reached that  
24 conclusion.

25 **MR. BOPP:** Right.

1                   **THE COURT:** They say it. But on what basis do they  
2 say it, particularly when they're basing this conclusion on  
3 anecdotal information within the VAERS system?

4                   **MR. BOPP:** Uh-huh.

5                   **THE COURT:** I didn't see any explanation for how they  
6 then drew the conclusion that there was a causative link.

7                   Did you see any evidence of that?

8                   **MR. BOPP:** No, not in the abstract.

9                   **THE COURT:** How am I to, then, absent true medical  
10 evidence of causation -- that's just a theory. That's not  
11 proof of anything; do you agree -- how am I to base the  
12 conclusion that you want me to base this conclusion on that  
13 there is a definitive or causative link between the vaccines  
14 and the risk of death?

15                  **MR. BOPP:** You know, I haven't yet said the word  
16 "definitive" because we have a brand-new vaccination, vaccine.

17                  **THE COURT:** Well, let's say it's to a reasonable  
18 degree of medical certainty. It's not definitive, but it's at  
19 least causative. It's not speculative.

20                  How am I to draw that link or draw that conclusion  
21 based on something that is merely a theory but not established  
22 to any reasonable degree of medical certainty?

23                  **MR. BOPP:** Well, it's certainly not a theory. It's  
24 more than a theory, because some of the Hill Factors are  
25 certainly existing there, so it's not just a theory, you know,

1 taken out of the blue. It is a methodology that is used for  
2 all vaccines; that is, there's a self-reporting and then they  
3 go investigate.

4 And, again, one of the -- see, it's like I'm getting  
5 hoisted, you know -- I mean, they didn't do the lengthy trials  
6 that they would normally do. And now I'm hearing that, because  
7 of that, it's my fault that we don't have the absolute, 100  
8 percent proof through peer-reviewed studies of links of things  
9 that are just appearing that would have appeared in the trials  
10 before it had national roll-out, and there would have been  
11 those studies and we would have known for sure, okay. Well,  
12 that's not the students' fault. It is the context in which we  
13 are, okay. That's the context. There are known risks and then  
14 there are known -- it is known that there are unknown risks,  
15 and now they're starting to manifest itself in ways that the  
16 scientific community uses all the time. That's the reason they  
17 have the VAERS system, so that there will be anecdotal reports.

18 **THE COURT:** I'm sorry, sir. I'm sorry.

19 So do we agree that the risk of death vis-a-vis any  
20 one vaccine is an unknown risk?

21 **MR. BOPP:** No. We know -- for many of the vaccines,  
22 we know the risks, because they've -- they went through full  
23 trials, and many of them have been used for decades.

24 **THE COURT:** No, I'm talking about the COVID-19  
25 vaccine.

1                   **MR. BOPP:** Oh, the three.

2                   **THE COURT:** What we're here to talk about today,  
3 Mr. Bopp.

4                   **MR. BOPP:** Sorry.

5                   **THE COURT:** Yeah. With respect to any of one of the  
6 three that have EUA approval, are we in agreement that the risk  
7 of death from one of those vaccines is today medically unknown?

8                   **MR. BOPP:** No. It's a strong suspicion, but it's not  
9 established to a reasonable degree of medical certainty.

10                  And the context here is not -- we're not suing the  
11 drugs, you know, saying the students ought to get damages.  
12 That would have to have been -- that causation link would have  
13 to be shown. We're suing Indiana University for making them  
14 take the vaccine and thereby stripping them of their right to  
15 decide for themselves and assume their own -- assume the risk  
16 and the benefits and make that judgment.

17                  IU can strip that from them, all right. The choice  
18 is the problem here. And the nature of the roll-out of the  
19 vaccine, including, you know, how it works, is novel, even  
20 though the mechanism is known. It's just never been approved  
21 by the FDA for use in vaccines. It's a known mechanism. I  
22 mean, there's just a number of aspects about this that -- why  
23 in the world is IU University practicing medicine? What  
24 studies have they seen that ensure -- ensure the safety of this  
25 vaccine they're requiring their students to take?

1 You know, we can only know what we know under the  
2 circumstances, but there is suspicion, you know, justifiable  
3 suspicion, that there are problems here.

4 And the thing I just told you about, I was told that  
5 the CDC is going to make a statement about this emerging  
6 problem with the J & J vaccine of an autoimmune disease,  
7 association with an autoimmune disease. I don't know.

8 But, you know, it would seem to me that it's  
9 unreasonable, even irrational, to require people to take a  
10 vaccine when there is so many unknowns and peculiarities.

11 **THE COURT:** It certainly begs the question "who makes  
12 that choice," right?

13 **MR. BOPP:** Well, under modern constitutional  
14 jurisprudence, you do, whether or not their choice was  
15 reasonable under the circumstances.

16 I mean, surely, we would say that it is unreasonable  
17 for IU to open the door of a room, dark room, and throw someone  
18 in there because of all the unknowns, right. I mean, that  
19 would surely be unreasonable, all right.

20 Well, to a certain extent -- and not fully, I  
21 understand, but to a certain extent -- that's the way we feel,  
22 you know. It's one thing to have the choice. And the students  
23 are all in favor of these vaccines being rolled out and people  
24 taking them if they choose to. They're not suing the vaccine.  
25 But they want -- they want to have their right of bodily

1 integrity not to have a foreign substance introduced into their  
2 body that they're required to take when they haven't consented,  
3 and particularly in this context in which there are so many  
4 unknowns but suspicion.

5 I mean, it's a perfectly rational choice for somebody  
6 to say, "Well," you know, "I understand you say this is going  
7 to help me," you know, "do X. But what are the problems with  
8 this medicine?"

9 And the person will say, you know, "Well" -- you  
10 would tell this person all the things we just were discussing.  
11 You know, it would be a perfectly rational decision by that  
12 person to say, "No." You know, "You say it's going to help me,  
13 but you can't tell me really, even though there's suspicions  
14 now, what the problems are associated with it." That's  
15 stripped by them from these people, and it's inexplicable to  
16 me, honestly.

17 Now, I mean, there's a couple of other things that  
18 are aspects to this. We have evidence but, no doubt, not to a  
19 reasonable degree of medical certainty, but we have evidence.  
20 We have evidence of vaccine reactions for COVID-positive  
21 people, students.

22 We have -- one of our plaintiffs had COVID, has  
23 antibodies, believes he is immune, but Indiana University will  
24 not exempt him, and that's in the face of emerging studies that  
25 say there's an increased risk of the -- recent UK study that

1 says there's an increased risk for adverse effects of the  
2 vaccine if you're COVID-positive, all right.

3 We also have --

4 **THE COURT:** How long do those antibodies last, based  
5 on current medical science? I know I've seen an article, a  
6 study, indicating that its longevity may be eight months. I'm  
7 not sure that was even in the context of this case. But what  
8 have you seen, Mr. Bopp, in that respect?

9 **MR. BOPP:** Well, that was going to be my next point.

10 You know, the problem is, they didn't do the  
11 long-term studies to determine the immunity that's afforded by  
12 the vaccines, and they also have not done long-term studies on  
13 natural immunity that arises from being infected. So, again,  
14 there's just a degree of unknown there.

15 There are some studies. Cleveland Clinic recently  
16 did one, but it was only for five months, but it's because  
17 that's when the vaccine became available, you know. So you  
18 can't study something that you don't have anything about. And  
19 they said that natural immunity from having the COVID infection  
20 provides the same level of immunity as do the vaccines.

21 Now, IU wants to argue over that and only talk about  
22 vaccines, but we don't even know for sure how long the immunity  
23 for that lasts. And we also don't know -- even though there's  
24 some emerging evidence on this, as well -- what effect the  
25 vaccinations have on protecting people from variants that are

1 coming along. So even the efficacy of the vaccines are now  
2 being called into question, whether or not they do anything,  
3 particularly against certain strains like the Delta.

4 But this isn't our problem. This isn't the students'  
5 problem. They didn't cause this problem. The problem is  
6 they're mandating it. They're forcing them to do this, despite  
7 all these unknowns.

8 So that does take us back to due process. Those were  
9 the contexts I wanted to mention to due process.

10 And we've already covered the fact that the law, the  
11 recent case of **Koontz** that sets out all of the cases, that if  
12 you condition a benefit on waiving a constitutional right --  
13 and it's not just a fundamental one. It would be a liberty  
14 one -- that means it's violated and triggers the appropriate  
15 level of scrutiny.

16 IU says, "Well, just go to another school."

17 Now, I represent a plaintiff here who has been at IU  
18 for years because she is one semester away --

19 **THE COURT:** From a Ph.D?

20 **MR. BOPP:** Yeah, not one but two Ph.Ds in just a few  
21 months.

22 So IU says, "Well, whatever. Go to another school."

23 What, and start all over, to get two Ph.Ds and spend  
24 another four or five years somewhere trying to do this? You  
25 know, that's coercive, to do that to somebody. You're coercing

1 a choice.

2 Now, Dr. -- yeah. Well, he is a doctor -- Dr.  
3 Carroll, who was a 30(b) (6) witness, when I asked him about  
4 that, he said, "Well, that's not coercion in the way" -- first,  
5 frankly, he quibbled a lot, said he didn't know what "coercion"  
6 means, but he said that's not coercion in his point of view.

7 Well, IU needs to understand that it is. They need  
8 to understand that. Because they make a lot of decisions about  
9 these students. And they right now think they can do anything  
10 as far as conditioning any benefit or any requirement, no  
11 matter what it is.

12 And, you know, and they've taken it so far not only  
13 about **Jacobson**, but to its progeny, **Buck v Bell**. They still  
14 think it's good law, **Buck v Bell** is good law. And, of course,  
15 as you know, **Jacobson** led directly to **Buck v Bell**. In fact, a  
16 quote out of **Buck v Bell** was that, you know, the mandate of  
17 forced vaccinations is broad enough to encompass forced  
18 sterilization -- I don't know if I can get through this one --  
19 and they cite **Jacobson**. And then the very next sentence is  
20 that horrific statement, "Three generations of imbeciles is  
21 enough." That is what **Jacobson** is. That's what it is. It's  
22 **Buck v Bell**. And Indiana University still thinks **Buck v Bell**  
23 is good law. They need to know that's not the case.

24 **THE COURT:** Mr. Bopp, if the vaccines, any one of  
25 those, were to achieve full FDA approval, does your

1 constitutional issue on behalf of the students fall away?

2 **MR. BOPP:** Oh, no. My goodness, no. I mean, one  
3 context, which is a certain amount of this insecurity -- I mean  
4 not insecurity -- unknown, you know, uncertainties, would  
5 surely be resolved, you know, at least in part, maybe in whole,  
6 once they do proper studies and do it for long enough that they  
7 can figure out these things, okay.

8 So, you know, that would simply mean that maybe  
9 they'll resolve that heart inflammations are not caused by the  
10 vaccine, okay. Well, then that falls away certainly.

11 But, no, we're not basing -- we're not suing them  
12 under the FDA claiming they improperly approved the drug.  
13 We're just saying it is part of the context. None of the other  
14 contexts fall away at all. I mean, the astronomical -- I mean,  
15 talk about -- you want to stop the spread of a disease, all  
16 right, Indiana University wants to -- and that's a very  
17 admirable goal, and there are many ways to do that, all  
18 right -- and you want to stop deaths by getting a COVID  
19 infection, so what you do is you order the people who are least  
20 vulnerable to adverse effects and death to take a vaccine.

21 The people that are somewhere between 600 times up to  
22 1700 times more at risk, nobody is telling them to get --  
23 nobody is mandating them.

24 I mean, there was one death at Indiana University  
25 through this whole pandemic, and there was a pandemic. There

1 was one death. Now, that's terrible, of course. But they're  
2 going to mandate everybody to get a vaccine in order to prevent  
3 one death?

4 Well, look. How many IU students die from car  
5 accidents and drug overdoses and suicides and all these other  
6 things. They don't ban cars at Indiana University to  
7 prevent -- and that's a right, to travel. They don't ban cars,  
8 you know. They just let them go willy-nilly out, out there,  
9 and kill themselves.

10 So it's -- so where is the narrow tailoring here,  
11 right?

12 Now, the other thing, of course, is where is the  
13 least restrictive means, as well. Depending on your level of  
14 scrutiny, I understand. They say masks work. That's the  
15 reason they're requiring them. They say testing works. That's  
16 the reason they're requiring it, as an extra requirement for  
17 people who get an exemption. They say that masking and testing  
18 did work over the last year-and-a-half, all right. Now, there  
19 were more severe measures, as well, of course, but, of course,  
20 the situation was much more severe. You know, we were going up  
21 and to the top of a bell curve where the numbers were, you  
22 know, a hundred times what they are now, all right. So I  
23 understand that, but they still think they work now, okay, and  
24 should be required now, all right.

25 And people who -- if you're talking about other

1 people, which they do talk about, even though Dr. Carroll  
2 disclaimed that, if they're talking about other people, well,  
3 those other people could get vaccinated. And IU says -- and we  
4 agree -- the vaccination works. So, you know, you don't need  
5 to, from our standpoint, strip these people of rights in order  
6 to benefit these other people.

7 And, in fact, historically, as a medical ethics  
8 thing, that is forbidden. It is forbidden to force somebody  
9 to, you know, take medical treatment because you're trying to  
10 benefit somebody else, you know. And so if that is the basis,  
11 they've really taken an extreme position.

12 **THE COURT:** Mr. Bopp, I don't mean to interrupt you,  
13 but I think I've given you a little more than an hour at this  
14 point in terms of your opening remarks. Time has flown, of  
15 course, as we have had our discussion.

16 I do have more questions for you, but we have 20  
17 minutes in rebuttal, so perhaps we can rejoin at that time.

18 **MR. BOPP:** And I have a few other things to say, too.

19 **THE COURT:** I suspect you probably do. Thank you,  
20 sir.

21 Ms. Ricchiuto, good afternoon.

22 **MS. RICCHIUTO:** Good afternoon, Your Honor.

23 May it please the Court.

24 We've got -- oh, good. There is a shot clock. I  
25 couldn't see it from where I was sitting.

1 We have a presentation that we're going to use just  
2 to kind of guide my remarks, if we can.

3 Can everybody see that okay?

4 **THE COURT:** Mr. Dahm, could we turn that slightly,  
5 that screen? That way, I can keep my focus on counsel here,  
6 too. I'll probably look at that one rather than the one behind  
7 me.

8 **LAW CLERK:** (Complies.)

9 **THE COURT:** Thank you.

10 **MS. RICCHIUTO:** Would you like a hard copy, Your  
11 Honor?

12 **THE COURT:** If you have one, I will take one. Thank  
13 you.

14 **MS. RICCHIUTO:** Sure.

15 May I approach?

16 **THE COURT:** You may.

17 Mr. Bopp, do you have a copy of this one, as well?

18 **MR. BOPP:** I do. Thank you.

19 **MS. RICCHIUTO:** Okay. Again, Your Honor, may it  
20 please the Court.

21 We join Mr. Bopp in thanking you for your really  
22 devoted attention to this on such an expedited timeline.  
23 Obviously, this is a matter of great importance to Indiana  
24 University, and we are grateful for the time that you and your  
25 staff have devoted to it and will continue to do so.

1 I want to start out by just taking a look at some  
2 recent data related to the pandemic. As I think Mr. Bopp and I  
3 agree, this is data that's changing every day. But what we  
4 know is that, as of yesterday in Indiana, we had over 600,000  
5 deaths or -- excuse me -- 600,000 nationwide, almost 14,000 in  
6 Indiana, and more people are testing positive every day.

7 And so if you look at that box, the second line, Your  
8 Honor, that says 7.5. I was rereading plaintiffs' reply brief  
9 last night. And at that time, which I think was filed on  
10 July 6th, that same statistic was 3.1. So just in that time,  
11 you know, that's roughly doubled, or more than doubled, just  
12 since that brief has been filed. So the point is, obviously,  
13 you know, these are numbers that are continuing to move.

14 There are lots of graphs and charts that look like  
15 this in the materials, Your Honor, but the main point that I  
16 want to make to you is that the wide variety of trend data  
17 that's available really demonstrates that you cannot look at a  
18 fixed moment in time and say that this pandemic is over. Or if  
19 you can, we haven't gotten there yet.

20 For example, looking at the charts that are in front  
21 of you, if you look at the time that the mandate was issued,  
22 which was late May, the cases were at a different point than  
23 even they are today. So, to the extent that someone thought,  
24 "Oh, gosh. We seem to be at a low point in May. We must be on  
25 the downward trajectory forever," we've already seen in the

1 time that the requirement has been in place cases are  
2 continuing to rise.

3 And, for example, I think Missouri, or parts of  
4 Missouri, might have just reinstated a mask mandate. You  
5 know, things are continuing to change.

6 We also know -- and Dr. Carroll testified -- this is  
7 a seasonal virus, so we're not surprised to see cases dipping  
8 in warmer months. And Dr. Carroll specifically testified, you  
9 know, last summer looked not so bad. And, then, as we all  
10 recall last Fall and last Winter, I know my kids got in school  
11 and out of school and in school and out of school, you know, as  
12 this situation continued to evolve.

13 So what I would just caution you is, as you're  
14 looking at the wide variety of data that we've put in front of  
15 you, please do pay attention to the end point on the chart.

16 I know that plaintiffs have submitted -- for example,  
17 they have an Exhibit 221. That stops on June 24<sup>th</sup>. Again,  
18 you look at that same chart, later point in time, and the data  
19 keeps moving.

20 I don't want to dwell on this because Mr. Bopp didn't  
21 dwell on it yet today. Although we may hear it from him, so I  
22 want to mention it. The plaintiffs have, at least in their  
23 discussion with our 30(b) (6) witness, constructed kind of an  
24 alternative mechanism in which to try to place the pandemic,  
25 and they rely on a couple of things. They rely on some CDC

1 guidance from 2014 and 2016 about Influenza A. Those are --  
2 these are their Exhibits 230 to 232.

3 And what I want to say about that CDC guidance is  
4 it's exactly what it looks like. It's regarding Influenza A,  
5 which is annual and cyclical, and not, you know, ever risen to  
6 the level of COVID. The CDC has never referred anybody with  
7 respect to COVID, "Hey, go look at our guidance from 2014," you  
8 know, "That's all we have to say about it." So the CDC isn't  
9 referencing anybody there. And I'd also note, IU requires a  
10 flu shot. So that's one construct that we just think -- and  
11 Dr. Carroll testified about that -- that really isn't  
12 appropriate here.

13 Plaintiffs also rely on an IU infectious disease  
14 policy that predates the pandemic. It was last updated in  
15 April of 2019. That's a little bit tricky because you have to  
16 take Exhibit 211 and 215 in their book. Those actually go  
17 together with the remaining exhibit, which is at 229. So I  
18 don't exactly know why they're separated. But the point I just  
19 want to make to you is that that IU infectious disease policy  
20 is part of a past separate policy. The entire policy is  
21 Exhibit 11 in Carroll's deposition, and you can read what he  
22 said about it.

23 But, in sum, IU, when hit with the COVID-19 pandemic,  
24 concluded it needed a whole new paradigm, that the existing  
25 policy that it had for infectious diseases generally wasn't the

1 right fit for the circumstances. And so to the extent that  
2 plaintiffs' position is that IU's kind of new restart work  
3 isn't applicable here and that they should be stuck with their  
4 2019 guidance, we just would note, you know, kind of the  
5 extraordinary new work that IU has done to develop a specific  
6 COVID policy.

7 **THE COURT:** So, let me ask you, Ms. Ricchiuto, if I  
8 can interrupt you.

9 In looking at the two different policies, the policy  
10 that IU has vis-a-vis other vaccines and the policy that it's  
11 adopted vis-a-vis the COVID-19, there are some fundamental  
12 differences in those two policies; do you agree?

13 **MS. RICCHIUTO:** Regarding other vaccines, Your Honor?

14 **THE COURT:** Well, in particular, it struck me -- and  
15 maybe this is an incorrect view -- that the policy that  
16 concerns other vaccines, measles and so on, has a true medical  
17 exemption in it.

18 The COVID-19 policy that IU has adopted doesn't seem  
19 to have a true medical exemption. In other words, it allows  
20 for an exemption if there are allergies to the ingredients of  
21 the vaccines, but it's a much broader medical exemption in the  
22 other policy, the policy that concerns these vaccines that have  
23 existed for a long time. And that struck me as odd, because in  
24 the world of EUA approval -- not vaccines that have full FDA  
25 approval and have existed for years and years and years -- IU

1 has chosen to be less forgiving in its COVID policy than it is  
2 in the other, and I would expect to see the inverse of that.

3 Why is that rational?

4 **MS. RICCHIUTO:** I certainly understand why, based on  
5 the written restart materials, that's exactly what it looks  
6 like. There are a couple of responses to that, Your Honor.

7 One is that the true -- and Dr. Beeler testified  
8 about this. The only contraindication specified for these  
9 vaccines specifically is these two allergy modes, so either the  
10 actual vaccine or a component. So from that perspective, IU's  
11 written exemption policy --

12 **THE COURT:** Well, that's a rather myopic policy then,  
13 isn't it?

14 In a world in which what we know about COVID-19, the  
15 virus and the vaccines, knowing that that is ever-evolving and  
16 ever-changing, why not simply word it in the same way; that if  
17 there are contraindications, that a student can get a medical  
18 exemption?

19 That's not the way the policy reads. Isn't that  
20 rather myopic and irrational?

21 **MS. RICCHIUTO:** I agree with you, Your Honor, that  
22 that's the way that the policy reads.

23 **THE COURT:** Isn't that myopic?

24 **MS. RICCHIUTO:** I agree that it's more narrow than  
25 the other policies are written.

1                   What the testimony is from the two representatives  
2 who are on the medical response team who are responsible for  
3 handling medical exemptions is that, in practice, they are  
4 daily communicating with physicians who provide information to  
5 them seeking exemptions and that very many of those have been  
6 granted.

7 So, for example, the doctor's note concept --

8                   **THE COURT:** But that's not the policy. Whether  
9 university in implementation is, you know, enforcing it in a  
10 more relaxed way, that's not the way the policy reads.

11 Do you agree?

12 MS. RICCHIUTO: I do.

19                   **MS. RICCHIUTO:** I don't agree that it's their  
20 position. I agree that it is what is reflected in their  
21 written materials and that there's tension there. I understand  
22 that, Your Honor.

23 THE COURT: Why is that rational?

**24** This strikes me as completely on its head.

25 If we have, for all these other vaccines, full FDA

1 approval, with an allowance for a counter-indication by a  
2 medical professional on behalf of a student, but when it comes  
3 to emergency use approval vis-a-vis these COVID-19 vaccines, IU  
4 says, "No. We're going to take a much more stringent view of  
5 these medical exemptions, and we're going to give you a small  
6 window in which to fit," if I have a medical doctor who says I  
7 should not take a vaccine, why does IU think they're in a  
8 better position to say, "That student, nonetheless, must have  
9 the vaccine"?

10 That strikes me as completely irrational.

11 **MS. RICCHIUTO:** I don't believe, as a matter of  
12 implementation, that that's the position that IU has taken.

13 **THE COURT:** Well, I don't have any evidence in the  
14 record as to its implementation, do I?

15 **MS. RICCHIUTO:** You have --

16 **THE COURT:** I have the policy.

17 **MS. RICCHIUTO:** I'm sorry, Your Honor.

18 You do have testimony from both Dr. Beeler and  
19 Dr. Carroll. They are two of the individual humans at Indiana  
20 University that process these exemptions, and they do testify  
21 under oath in the record to the way that they've been  
22 processing them and the way that they've been granting them, so  
23 you do have that information as implementation in the record.

24 And our demonstrative at the end of our book that  
25 refers to testimony, there should be an entry related to

1 exemptions, and that would point you to the relevant testimony  
2 on that.

3 **THE COURT:** Then why didn't Ms. Carini get a medical  
4 exemption?

5 **MS. RICCHIUTO:** So I'm glad that you asked that  
6 because I was going to raise that also.

7 Ms. Carini -- I think you asked Mr. Bopp whether any  
8 plaintiff had a medical exemption and no other exemption, and  
9 the answer to that is "no." Ms. Carini is the only one who has  
10 said in the complaint, or in her deposition, that she actually  
11 has a doctor's note, as opposed to, for example, a concern  
12 herself.

13 And she is eligible for an exemption, a medical  
14 exemption. She already has a religious exemption. And so IU  
15 simply communicated to her, you know, from their perspective,  
16 you're either exempt or you're not exempt. She was having some  
17 trouble uploading the paperwork in the portal and getting  
18 frustrated about that, and they said, "You know what, you're  
19 already exempt from a religious perspective. There's not a  
20 difference in the exemption. You're covered."

21 But she is -- under the testimony of Dr. Carroll and  
22 Dr. Beeler, she's eligible for that medical exemption, and I  
23 have every reason to expect that that would be granted if, for  
24 some reason, they were of value to her in having two exemptions  
25 from the same requirement.

1                   **THE COURT:** So maybe I missed some evidence in the  
2 mass here in reviewing this stuff quickly last night.

3                   But when I read Ms. Carini's deposition, I thought  
4 she testified, did she not, that she sought a medical exemption  
5 and was denied that?

6                   **MS. RICCHIUTO:** I don't believe that -- I agree with  
7 you -- I agree with Ms. Carini. She does not have one. So I  
8 don't want to have like a matter of semantics. But I think  
9 what the communications are that we have seen are that she had  
10 a religious exemption in place. She reached out to IU try to  
11 get a medical exemption. She tried to do that by e-mail. They  
12 said, "Actually, you need to use this portal." She had a hard  
13 time with the upload. She was getting frustrated, like, "Hey,"  
14 you know, "I want to give you the information." And so someone  
15 as a matter -- you know, I think probably trying to be  
16 convenient to Ms. Carini, said, "You know what, don't worry  
17 about it. You're already covered by an exemption."

18                   So if you deem that a denial, then I suppose that's a  
19 denial. I don't think that I would deem that a denial of an  
20 exemption.

21                   **THE COURT:** I'm sorry to interrupt you. Give us a  
22 moment.

23                   Ms. Gutwein [verbatim], did you find whether any  
24 other student has a physician's note that says that they should  
25 not be taking the vaccine?

1                   **MS. SIEBERT:** Thank you. Miss Siebert for the  
2 plaintiff.

3                   **THE COURT:** Oh, Siebert. I'm sorry. I said,  
4 "Gutwein."

5                   **MS. SIEBERT:** It's fine. It's fine.

6                   **THE COURT:** Ms. Siebert.

7                   **MS. SIEBERT:** Ms. Roth did not have a doctor's note,  
8 but she has her own personal concerns, but based upon the  
9 written policy of IU knows that she would not qualify for a  
10 medical exemption.

11                  **THE COURT:** All right. Thank you.

12                  **MS. SIEBERT:** Uh-huh.

13                  **THE COURT:** I'm sorry. I wondered if we had run that  
14 to ground.

15                  **MS. SIEBERT:** No problem.

16                  **THE COURT:** So, if I want to look at how IU is  
17 actually implementing the medical exemption, then I need to  
18 look closely at Mr. Carroll's deposition?

19                  **MS. RICCHIUTO:** I would -- yes, I would point you to  
20 Exhibit 320, which is our kind of guidepost for you for  
21 specific topical information testified to by our witnesses, and  
22 you will find citations to Dr. Beeler's testimony and  
23 Dr. Carroll's testimony. They are both members of IU's Medical  
24 Response Team. And they both personally review, really on a  
25 daily basis, I think they testified, Judge, these medical

1 exemptions, and from time to time interact with providers.

2 You'll have a provider say -- I think there's  
3 testimony that says, you know, "Gosh, I don't think my patient  
4 should get the vaccine. They have diabetes." And then IU  
5 might respond and say, "Gosh, let us give you some information.  
6 Diabetes is not actually a contraindication." And a lot of  
7 times, the testimony is the physicians say, "Oh, thank you for  
8 telling me. I agree my patient should get vaccinated."

9 Other times, there's another reason. You know, the  
10 classic example is people who are on immunosuppressant drugs  
11 where they wouldn't have an immune response to anything anyway.

12 **COURT REPORTER:** Ma'am, would you slow down, please?

13 **MS. RICCHIUTO:** I'm sorry.

14 **MS. RICH:** They wouldn't have an immune response,  
15 anyway. And so Indiana University says, "Certainly, right now  
16 isn't a time that makes sense for you to be vaccinated," you  
17 know, "let's talk through your course of treatment. Will there  
18 be a good time in the future where you may be off of your  
19 immunosuppressants." And those things really have been dealt  
20 with on a case-by-case basis in consultation with the  
21 physicians who have submitted exemptions.

22 **THE COURT:** So according to these two depositions,  
23 Dr. Beeler's deposition and, is it, Dr. Carroll or Mr. Carroll?

24 **MS. RICCHIUTO:** Dr. Carroll. He's the chief health  
25 officer for IU.

1                   **THE COURT:** Okay. Dr. Beeler and Dr. Carroll.

2                   Is it your view that when I review those depositions,  
3 what they will say to me is that, when it comes to this medical  
4 exemption, Indiana University is not enforcing the policy to  
5 its letter, but instead going beyond allergies to the  
6 ingredients of these vaccines and providing ongoing medical  
7 exemptions if a student's physician says he or she should not  
8 take it and remain unconvinced after this give and take?

9                   **MS. RICCHIUTO:** That is exactly correct, Your Honor,  
10 and that wouldn't cover, you know, as --

11                  **THE COURT:** Then why didn't IU revise its policy?

12                  **MS. RICCHIUTO:** It's possible they'll consider doing  
13 it.

14                  **THE COURT:** Because, as written, it sounds  
15 troublesome.

16                  Don't you agree that, as written, it's troublesome?

17                  **MS. RICCHIUTO:** I think, as written, it very exactly  
18 tracks the CDC contraindications. And as written, it does not  
19 exactly match the way they're implementing it.

20                  I want to make one other point here just almost,  
21 frankly, so I don't forget, Judge.

22                  Mr. Bopp talked to you about considerations taken on  
23 behalf of others in the community and, you know, whether that's  
24 reasonable and who those people should be. And I think you  
25 asked a question about whether you should take into account the

1 rest of IU's population. And I want to just clarify a little  
2 bit because I think the description and the testimony maybe  
3 doesn't exactly match the way the testimony came in.

4 Dr. Carroll was asked basically, with respect to, for  
5 example, the community of Bloomington or the county of Monroe,  
6 "Is the purpose of this policy to protect all of those people,"  
7 and Dr. Carroll's testimony on that was, "No, that's not the  
8 primary goal of this policy. It's a great secondary benefit,"  
9 you know, "We're for fewer people getting COVID. But that's  
10 not the purpose of the policy." So that Q and A was not  
11 directed at kind of the IU community as a whole.

12 It is absolutely the case, given that this policy  
13 extends to faculty, staff, students -- obviously, we're focused  
14 on students in this lawsuit, but the policy itself is broader  
15 than that -- and it is absolutely the case that IU does care  
16 and has focused on the general population health of its  
17 community at large, you know, kind of IU community being people  
18 in and affiliated with the university, as opposed to, you know,  
19 physically in the same town as the campus.

20 And there's a number in Carroll's declaration that  
21 estimates -- that's at Paragraph 26, and it estimates  
22 approximately 8500 staff at risk. I will tell you that is, you  
23 know, kind of rough, quick math based on what we know about  
24 what conditions the IU staff has. So it's good numbers, but  
25 it's probably -- you know, it could be over- or

1 under-inclusive, based upon what data we were able to have  
2 access to. But that is information that IU did consider, and  
3 that's also in the record, so I just wanted to clear that up,  
4 if I could.

5 **THE COURT:** All right. Thank you.

6 **MS. RICCHIUTO:** So, getting just a little bit back on  
7 track, Mr. Bopp mentioned variants. Obviously, those are out  
8 there.

9 There is this question about herd immunity.  
10 Plaintiffs have an Exhibit 243 that is a techstartups.com  
11 article. There's extensive testimony in Dr. Beeler's  
12 deposition around where Exhibit 14 was marked that explains why  
13 his view is that it's not herd immunity.

14 The easiest lay way for me to understand it, Judge,  
15 is that we see the numbers going up. If there were herd  
16 immunity in the U.S. or in Indiana, you wouldn't see that. So  
17 that's not scientific, but that's the way that's very easy for  
18 me to get my head around the herd immunity concept.

19 So, as I said, IU had this existing policy that had  
20 been last updated in April of 2019. And what it did in  
21 response to COVID is that President McRobbie, you know, mounted  
22 a very robust, educated, expert group of people in terms of a  
23 Restart Committee that was formed, not just on this policy,  
24 Your Honor, but way back at the beginning in Spring of 2020, to  
25 start thinking about how are we going to bring people back,

1 what's that going to look like for each semester, and to keep  
2 track of that.

3 You can see -- and this is in the Restart Committee  
4 report that you have. It's the most updated one. It's already  
5 been updated since this case has been filed. So the most  
6 updated one -- I think that's one that both parties probably  
7 put in the books -- for us, it's 300. And you've got a wide  
8 variety of expertise. These folks worked together to provide  
9 detailed reporting to IU's leadership on a weekly basis.

10 We did not give you every single presentation that  
11 was made to IU's leadership for the relevant period. Our  
12 Exhibits 302 to 317 give you examples, and I would, you know,  
13 certainly commend those to your attention if you are interested  
14 in what are the types of things that the Restart Committee was  
15 considering.

16 It is the case that the Restart Committee was not the  
17 decision maker. The Restart Committee is an advisory body that  
18 advised IU's leadership, who obviously ultimately made the  
19 policy. But you can see they were focused on vaccine  
20 development, surveillance, contract tracing --

21 **COURT REPORTER:** Ma'am, please slow down.

22 **MS. RICCHIUTO:** I'm sorry.

23 Dr. Beeler -- this kind of funny cover sheet --  
24 Dr. Beeler is all business, so it doesn't surprise me that he  
25 doesn't have a fancy cover on his decs. But his decs deal with

1 current stats all the time. He testified in his deposition  
2 that he reads, every single day, the latest in, you know, kind  
3 of COVID studies or other information that's coming out. So,  
4 anyway, those are the types of inputs that the Restart  
5 Committee was getting.

6 IU also did not -- you know, even with these inputs,  
7 they didn't create their policy based on a blank piece of  
8 paper. There's substantial federal guidance, obviously. The  
9 CDC has issued specific recommendations for institutes of  
10 higher education, of which IU is one.

11 And plaintiffs stress that the CDC doesn't recommend  
12 or require a mandate. And it is right, and both of our IU  
13 witnesses testified, the CDC doesn't take a position one way or  
14 another on a mandate. It's certainly not contrary to federal  
15 guidance to have a requirement in place. And, you know,  
16 certainly our position is it can't be unreasonable to follow  
17 what federal authorities say is the very best tool that we  
18 have. For IU to want to implement that widely, that seems like  
19 that certainly has to be reasonable. You know, you could dig a  
20 hole with a spoon. But why would you do that if you have a  
21 shovel? So the science and the CDC recommendations are very  
22 clear that the vaccine is the most effective tool, and IU has  
23 absolutely taken the position that it wants to use that tool as  
24 widely as it can.

25 The Department of Education, which is another federal

1 entity, also has issued guidance. These sources are cited  
2 extensively in our brief and in Dr. Carroll's declaration.

3 **THE COURT:** What is it, Ms. Ricchiuto, about the EUA  
4 approval of the vaccines that either gave the Restart Committee  
5 comfort that mandating the vaccine was wise or sound policy or  
6 gave the Board of Trustees comfort that this was the right  
7 decision to make?

8 **MS. RICCHIUTO:** I'm reluctant to exactly speak for  
9 leadership, but I understand your question.

10 The EUA statute that is discussed in the **Bridges**  
11 lawsuit, which is the recent Texas case dealing with an  
12 employer/employee relationship -- so slightly different  
13 context -- but that one also analyzes this EUA argument. The  
14 EUA -- and I think Mr. Bopp even said -- it's not something  
15 that places restrictions on universities. It talks about when  
16 you have a drug or device that has this level of approval -- so  
17 EUA as opposed to full approval -- you have to make sure that  
18 people know that and that they're not getting, you know, the  
19 drug or the device without fully knowing that, and they have to  
20 have the ability to say "no."

21 **THE COURT:** And I understand that and I appreciate  
22 where you're heading here. And maybe my question wasn't very  
23 clear, so let me re-ask it.

24 I'm not so concerned about the statute under which  
25 the Secretary of Health and Human Services operates that has

1 been cited as a concern with the EUA. I'm focused on the EUA  
2 process itself.

3 The reality is, these vaccines don't have full FDA  
4 approval. They've gone through this EUA process, which, if I  
5 understand the history correctly -- and you all can correct me  
6 on this -- is something that was created in the early 2000s at  
7 the time of anthrax, correct, around 2005?

8 **MS. RICCHIUTO:** I will have to take your word on  
9 that, Judge.

10 **THE COURT:** Okay. So this EUA process is something  
11 that is fairly novel, from what I understand.

12 What is it, nonetheless, about the EUA process, the  
13 fact that these vaccines have received that approval, though  
14 not full FDA approval, that, nonetheless, gave the Restart  
15 Committee and the Board of Trustees comfort that this is the  
16 right policy for Indiana University and its students?

17 **MS. RICCHIUTO:** Dr. Beeler testified in his  
18 deposition that these are the most widely-studied vaccines  
19 ever. Certainly they were developed relatively quickly, from  
20 the lay perspective, but I think the sciences that they were  
21 based on, building blocks that have been around for a long  
22 time, they went through full Phase 3 trials. Dr. Beeler  
23 testified about the robust Phase 3 trials.

24 And he got asked a question by Mr. Bopp about, you  
25 know, "Well, if there were all these trials, why didn't this

1 heart issue arise or why didn't these other side effects  
2 surface," and Dr. Beeler's answer was "because they are that  
3 rare." So even despite the very widespread Phase 3, which  
4 means kind of, you know, live-in-humans testing, the side  
5 effects that now that Mr. Bopp is maybe concerned about, number  
6 one, they're the causation issues that you discussed with him,  
7 but, also, those didn't surface, despite the (unintelligible).

8 So I think that, you know, we all have come to be  
9 comfortable with the concept of FDA approval, but I think the  
10 supposition that EUA is somehow automatically inferior or  
11 implies a not-robust process at all just isn't supported by  
12 what went into that process and the amount of testing that  
13 really has been done by the government on these three options.

14 **THE COURT:** And do I have evidence in the record  
15 that, in fact, the FDA's EUA process that led to that type of  
16 approval was more stringent or rigorous than its EUA process as  
17 stated by its industry practice or regulation?

18 **MS. RICCHIUTO:** I think that you -- I don't know  
19 about that comparator, Your Honor. I think that you certainly  
20 have evidence in the record from Dr. Beeler about the scope of  
21 the work that went into the FDA's process leading up to EUA  
22 approval.

23 Okay. So, turning to the actual policies at issue,  
24 we have talked about -- obviously the main concern of the  
25 plaintiffs is the requirement that they be vaccinated or

1 subject to an exemption. We have talked about the medical  
2 exemptions already during our time together.

3 The religious exemption, what the testimony describes  
4 is that it is -- just one second, Your Honor. Oh, okay -- is  
5 that the religious exemption is that it's automatic, so there's  
6 not even a human that reviews a religious exemption. You, you  
7 know, click the box, if you will, you say you have one, and you  
8 immediately get an approval back.

9 **THE COURT:** So how is the university going to police  
10 this policy?

11 **MS. RICCHIUTO:** So from the perspective of religious  
12 exemptions for the vaccine itself, they are relying merely on,  
13 you know, representations and attestations by folks that they  
14 have a sincere religious objection, and they are leaving it at  
15 that.

16 With respect to, for example, masking, which would be  
17 kind of the most obvious thing that you could police, right,  
18 because you can see -- you know, if you have someone in front  
19 of you, and you think "I know that person is not vaccinated,  
20 but I also don't see them wearing a mask. That concerns me"  
21 -- Dr. Carroll testified in his deposition that IU will not be  
22 giving guidance to students or others about reporting each  
23 other or tattling on each other or saying, you know,  
24 "Ms. Gutwein is not wearing a mask," or, "I'm worried about  
25 that."

1                   **THE COURT:** It's the honor system?

2                   **MS. RICCHIUTO:** I think that it is a policy of the  
3 university that is subject to the ways that all university  
4 policies are subject to enforcement, but that IU does not  
5 intend to have like a strike force out in the streets asking  
6 for vax cards or looking for masks or anything of the sort.  
7 They're issuing requirements that they expect their students to  
8 follow, just like lots of other requirements that their  
9 students have to follow that they don't, you know, sort of  
10 follow them around and monitor them for.

11                  And with respect --

12                  **THE COURT:** So this won't be a basis for discipline  
13 at the university through the student group?

14                  **MS. RICCHIUTO:** Oh, I don't want to say that. I  
15 mean, I think it's a policy that will be enforced. You know,  
16 if there were some student who -- you know, I hesitate to make  
17 a hypothetical, but I don't think that the intention is to  
18 disregard it or call it aspirational. But I also know that  
19 what Dr. Carroll testified to was that there was no intention  
20 to have like a robust enforcement arm with respect to masking  
21 and certainly not student-to-student.

22                  So you could have, for example -- I mean, I'm just  
23 imagining here -- like an RA, for example, who may be aware of  
24 a situation with a student who is repeatedly going into, you  
25 know, a dorm meeting with lots of people who is subject to the

1 mask requirement and isn't masking. Could there be some  
2 consequence for that? I think IU has reserved the right for  
3 there to be. But, again, you know, the testimony is that IU  
4 does not have any kind of robust enforcement with respect to  
5 masking.

6 With respect to testing, there is some amount of  
7 testing that will apply to everyone, regardless of vaccination  
8 status, so that's what we call surveillance testing, and that's  
9 to see whether there have been break-through infections of  
10 concern, and that applies to the whole IU community in terms of  
11 students, faculty, staff, everyone. And then there's  
12 mitigation testing for the people that are most at risk, and  
13 that is focused on unvaccinated people because, as a factual  
14 matter, they happen to be most at risk.

15 **THE COURT:** And the university is comfortable with  
16 that system in place? In other words, for those who have  
17 exemptions, they're comfortable addressing the nature of the  
18 pandemic, whatever it is in the Fall of this year, in terms of  
19 social distancing, masking, and surveillance testing?

20 **MS. RICCHIUTO:** And vaccination, Your Honor, yes.

21 **THE COURT:** Well, I mean, for those who are  
22 exempted --

23 **MS. RICCHIUTO:** Yes.

24 **THE COURT:** -- they're comfortable with that process?

25 **MS. RICCHIUTO:** They --

1                   **THE COURT:** They don't have any health concerns about  
2 the safety of its campuses for those who have obtained  
3 exemptions?

4                   **MS. RICCHIUTO:** I don't think that I would agree that  
5 they have no concerns. I think Dr. Carroll testified  
6 unequivocally; their goal is to have as many people vaccinated  
7 as they possibly can.

8                   **THE COURT:** Well, whatever their concerns are, they  
9 must be comfortable enough that whatever number of students  
10 receive exemptions under IU's policy can be addressed in a safe  
11 way through masking, social distancing, and surveillance  
12 testing, right?

13                   **MS. RICCHIUTO:** I agree with you.

14                   **THE COURT:** Then why not allow that to happen for  
15 students who want to opt out altogether? If that's sufficient  
16 for whatever vast number of the student population at Indiana  
17 University to be handled in a safe enough way, why not let  
18 students opt out? Why not let students choose and handle it,  
19 again, in the way of masking, social distancing, and  
20 surveillance testing, just as the university did last year?

21                   **MS. RICCHIUTO:** I agree that that's an option that IU  
22 had available to it. They have opted, instead, to take the  
23 most robust possible approach that they can, based on the  
24 federal guidance, and really do everything they can do to  
25 encourage maximum vaccination.

1 If you leave it to choice, you --

2 **THE COURT:** Well, one person might say taking a  
3 nuclear bomb to a mosquito is rational. Someone else may say  
4 it's not.

5 So why is taking the most robust way, as you put it,  
6 the rational choice here?

7 **MS. RICCHIUTO:** Well, I think the question gets a  
8 little bit into level of scrutiny, Your Honor. Under **Jacobson**,  
9 a rational basis, it just has to be reasonable. And it is  
10 certainly reasonable for IU to use all of the tools that it has  
11 at its disposal to try to mitigate the spread on its campus.

12 Last Fall, it didn't have this additional tool,  
13 right. So, yes, they had masking and distancing and testing,  
14 and they did the very best that they could with what they had,  
15 and now they have an additional tool available to them. And we  
16 believe that the law finds that it's reasonable for IU to make  
17 the decision to avail itself, for the safety of its community,  
18 of every tool that's available. It doesn't mean that some  
19 other alternative --

20 **THE COURT:** Can the university -- can the university  
21 mandate that its students get the HPV vaccine?

22 **MS. RICCHIUTO:** The university certainly mandates  
23 other vaccines.

24 **THE COURT:** I'm talking about HPV.

25 **MS. RICCHIUTO:** I think it would depend on what the

1 risks were to the campus posed by HPV. If HPV were airborne --

2 **THE COURT:** The CDC recommends HPV, does it not?

3 **MS. RICCHIUTO:** I think they do, yes.

4 **THE COURT:** Okay. So why doesn't Indiana University,  
5 in its infinite wisdom, think that it's rational, reasonable to  
6 mandate that its students receive the HPV vaccine?

7 **MS. RICCHIUTO:** I don't assume that they don't think  
8 that's reasonable. I think they've at this point concluded  
9 that that's not a policy that they're going to pursue, but I  
10 don't think it's reasonable --

11 **THE COURT:** So your view is the university could do  
12 that next?

13 **MS. RICCHIUTO:** No, Your Honor. My view is that --

14 **THE COURT:** So they couldn't mandate HPV as a vaccine  
15 for its student population?

16 **MS. RICCHIUTO:** My view is that if the university had  
17 the same --

18 **THE COURT:** Is that a "no" or a "yes"?

19 **MS. RICCHIUTO:** If the university -- I think they  
20 could if they had the same data available to them about the  
21 danger and the widespread contagion caused by HPV to members of  
22 their general population. I think it --

23 **THE COURT:** What if the Trustees said, in their  
24 infinite wisdom, that the benefits of cervical cancer could be  
25 addressed by the HPV vaccine such that we think that all

1 students at IU should get it? Is that reasonable?

2 **MS. RICCHIUTO:** If the data were reflective of a  
3 comparable risk to IU, then I think the analysis would be  
4 similar.

5 I'm not a -- I don't have a record developed on, you  
6 know, the precise risks or --

7 **THE COURT:** Well, suppose the university said, in its  
8 infinite wisdom, that it wanted to prescribe to its students,  
9 mandate to its students, the receipt of a fully FDA-approved  
10 drug, say Adderall. "Adderall helps people focus, so our  
11 students will get better grades. We think the IU population  
12 should receive that drug."

13 Can the university do that?

14 **MS. RICCHIUTO:** I don't think you have the same  
15 government interests at stake from that perspective.

16 **THE COURT:** It's not a legitimate interest that our  
17 students excel?

18 **MS. RICCHIUTO:** It's not a matter of public health  
19 and safety. That is something that is firmly within the  
20 school's powers.

21 For example, IU does require the flu vaccine, and it  
22 requires the flu vaccine for similar reasons to why it requires  
23 the COVID vaccine. So IU does consider various treatments and  
24 determine whether or not they need to be required.

25 But I want to make sure to say to you, Judge, that IU

1 is not contending that its decisions on these things are  
2 unreviewable, that it has limitless power, that it is standing  
3 in the shoes of everyone's physician. IU's decisions are  
4 reviewable. They're reviewable under the framework that we'll  
5 go over. And there are unquestionably probably some decisions  
6 that IU could make along the lines that you're suggesting that  
7 would go over the line, that would become unconstitutional.

8 The COVID vaccine today --

9 **THE COURT:** You want to put me on that slippery  
10 slope?

11 **MS. RICCHIUTO:** Huh?

12 **THE COURT:** You want to put me on that slippery  
13 slope?

14 **MS. RICCHIUTO:** I want you to, Your Honor, consider  
15 the current state of --

16 **THE COURT:** That's the slippery slope Mr. Bopp's  
17 concerned about, right, that ultimately led to a rather  
18 infamous decision?

19 **MS. RICCHIUTO:** Your Honor, whether it's slippery is  
20 not the same as whether it's limitless. And so reading --  
21 whether you read **Jacobson**, whether you use the rational basis  
22 standard, as it's more modern, you know, more modernly phrased,  
23 there are limits. Upholding this vaccine is not the same as  
24 saying IU can do whatever it wants whenever it wants with  
25 respect to its students. What upholding and denying the

1 injunction today does, Your Honor, is say that there is a  
2 legitimate government interest here, which multiple courts have  
3 acknowledged, even that it's compelling -- so it's certainly  
4 legitimate. I think even plaintiffs' reply brief concedes it's  
5 legitimate -- and that this is a reasonable way to deal with  
6 it. It's not the only way to deal with it.

7 **THE COURT:** When will it end?

8 **MS. RICCHIUTO:** The pandemic?

9 **THE COURT:** No. When will this vaccine mandate end?

10 **MS. RICCHIUTO:** I can't answer that, given the way  
11 that the data is running around.

12 **THE COURT:** How long is this policy in place?

13 **MS. RICCHIUTO:** Right now, this is a policy that is  
14 in place for the Fall semester.

15 **THE COURT:** And what's the plan of either the Restart  
16 Committee or the Trustees in terms of reviewing the plan?

17 **MS. RICCHIUTO:** What I can tell you on that is that  
18 they have consistently reviewed and updated their -- you know,  
19 we can only go by what they've done so far, and what they've  
20 done so far is, since Spring of '20, issued multiple updates to  
21 this plan, again including one since plaintiffs filed their  
22 case. So can I promise you what day they're going to update  
23 the policy? No, I can't. What I can tell you is that, based  
24 on the way that they've been behaving and their transparency in  
25 their decision making, I have every expectation that, if

1       circumstances were to change, IU would be investigating whether  
2       it's time to update its policy. We know that it has done that  
3       with respect to other policies since COVID began, and there's  
4       every reason to think that they would do so here, as well.

5           **THE COURT:** So Mr. Bopp wants me to put the onus on  
6       the university. Maybe that's not unfair to do so here. So let  
7       me ask you a question that I asked him.

8           With respect to the risk of the vaccine -- and let's  
9       start with death, the most serious one -- is there any  
10       authoritative peer-reviewed study that establishes that there  
11       is no risk of death vis-a-vis any one of the vaccines?

12           **MS. RICCHIUTO:** I don't believe there's any such  
13       study in the record. I also don't believe there's any such  
14       study that conclusively establishes the risk of COVID itself,  
15       and so --

16           **THE COURT:** There's an unknown there.

17           **MS. RICCHIUTO:** Yes. Both things are continuing to  
18       be studied.

19           **THE COURT:** What about heart inflammation or  
20       myocarditis? Is there any study that would show that there is  
21       no causative link, to a reasonable degree of medical certainty,  
22       between the COVID-19 vaccine and those conditions?

23           **MS. RICCHIUTO:** I'm not aware of a study that has  
24       disproven causation to date.

25           What Dr. Beeler testified to --

1                   **THE COURT:** How is it, then, that the university is  
2 so prescient that it can forecast into the future that these  
3 seeming temporal associations, nonetheless, have no causative  
4 link?

5                   In other words, what happens five years down the road  
6 when medical science catches up and establishes a link between  
7 either death and the vaccine, or myocarditis and the vaccine,  
8 or any number of these conditions and the vaccine, and we look  
9 back in history and say, "Gosh, I wish we would have known that  
10 before we told all these students to get it"?

11                  **MS. RICCHIUTO:** I don't --

12                  **THE COURT:** How is that rational for the university  
13 to make a prescient decision that's not based on any medical  
14 science?

15                  **MS. RICCHIUTO:** Well, Your Honor, I think that the  
16 university is not required to be prescient. What the  
17 university is required to do to be reasonable is to take into  
18 account the information that we have today.

19                  Dr. Beeler testified that, as of right now, the  
20 incidents of myocarditis resulting from the actual COVID virus  
21 are higher than the incidents of myocarditis resulting from the  
22 vaccine, so that's one input that is rational for the  
23 university to take into account, and so --

24                  **THE COURT:** Well, it simply says -- it simply says  
25 that there may also be the risk, you know, if you got COVID-19,

1 right.

2 **MS. RICCHIUTO:** Correct.

3 **THE COURT:** Which you may get or you may not. But,  
4 gosh darn it, if you get the vaccine and there's a risk, a  
5 medically linked risk of myocarditis, well, you eliminated the  
6 possibility of chance there altogether, right?

7 There's a distinct difference between those two.

8 Mandating that someone get a vaccine, injecting that into their  
9 body, creates a certainty if in fact there is a medical link  
10 that is eventually established. Whereas, if a student  
11 decides -- if in fact it's his or her decision -- not to get  
12 the vaccine and to run the risk of whether or not to get COVID  
13 at all, that may or may not occur.

14 One seems more certain than the other, does it not?

15 **MS. RICCHIUTO:** That's correct, Your Honor, but I  
16 think that that comparison --

17 **THE COURT:** The EUA process, to date, has it fleshed  
18 out the risk of these vaccines in terms of women who want to  
19 have children?

20 In other words, have there been either clinical  
21 studies done, Phase 3 or whatever, or other studies done, to  
22 flesh out whether these vaccines pose any such risk?

23 **MS. RICCHIUTO:** I think that Dr. Beeler -- I believe  
24 that he testified that that is probably work that is ongoing.

25 **THE COURT:** It's ongoing, okay.

1 So we have how many number of women who are students  
2 who may want to have children some day?

3 **MS. RICCHIUTO:** I don't have that number, but I'm  
4 sure it's high.

5 **THE COURT:** All right. Why is it rational for  
6 Indiana University, not knowing what the medical science is,  
7 having no basis to know what the medical science is in that  
8 respect with respect to these vaccines, thinking, in its  
9 infinite wisdom, that we're going to, nonetheless, tell these  
10 women that you must get the vaccine?

11 **MS. RICCHIUTO:** I think I disagree, Your Honor, with  
12 the characterization about whether the women have a choice.  
13 They -- no one has to get a vaccine. The students are the  
14 decision makers. I think that's a question you asked to  
15 Mr. Bopp. The students are the decision makers with their  
16 medical providers about whether or not to get the vaccine.

17 Could it be a hard choice for some of them?

18 I will grant you, for Natalie Sperazza -- who, by the  
19 way, is the only person that we have here who is not exempt  
20 from this. Although, she's not physically here --  
21 Ms. Sperazza is the only person who has this choice to make.

22 Could that be a hard choice for Ms. Sperazza? I'm  
23 sure it might be a hard choice.

24 **THE COURT:** You agree she has standing here, by the  
25 way?

1 MS. RICCHIUTO: Yes.

2 THE COURT: So if she has standing, I don't need to  
3 address the standing of every other student under the law; do  
4 you agree?

5 MS. RICCHIUTO: I agree with that with respect to the  
6 vaccine mandate. I think that with respect to the extra  
7 requirements, even setting aside our kind of broader concern  
8 about those, what we've seen in the filings is that they sort  
9 of have pieced together like, well, this person is kind of  
10 worried about this, and this person thinks there might be harm  
11 from the mask, and this person -- and I don't believe that,  
12 with respect to the extras, they've actually demonstrated  
13 standing with respect to everybody. But with respect to the  
14 vaccine requirement, I agree that Ms. Sperazza has standing,  
15 and everybody else either has or could have an exemption.

16 THE COURT: But under the law, I just have to  
17 establish that there is a case or controversy under Article  
18 III, not that a case or controversy is presented by each and  
19 every plaintiff, correct?

20 MS. RICCHIUTO: I agree with that.

21 THE COURT: Okay.

22 MS. RICCHIUTO: So if you find that one person has  
23 adequately alleged what they need to allege on masking and  
24 testing, then there would be standing over there.

25 But to finish my point about Ms. Sperazza, you know,

1 to the extent this is a hard choice for her, I have empathy for  
2 that. Hard choices are not unconstitutional.

3 And we have cited a case, **Hodges**, that talks about a  
4 wide variety of different reasons why students can be dismissed  
5 from their school or not allowed to go to their school anymore  
6 because of violating policies. And in that way, this is not  
7 different from that.

8 So, she has testified -- specifically with respect to  
9 Ms. Sperazza, she's testified she'll either go to community  
10 college. She'll work full-time. That case directly deals with  
11 facts like that and says --

12 **THE COURT:** I appreciate your choice argument here,  
13 but you agree with me that the Unconstitutional Conditions  
14 Doctrine applies?

15 **MS. RICCHIUTO:** Your Honor, only insofar as you  
16 believe that there's no choice.

17 **THE COURT:** Well, I mean, I think the doctrine is  
18 hinged on something altogether different, right, has the state  
19 conferred a benefit on these students. And by admitting them,  
20 while there may not be a constitutional right to a collegiate  
21 education, they have admitted them and thereby conferred a  
22 benefit on them to attend Indiana University.

23 Do you agree?

24 **MS. RICCHIUTO:** Yes.

25 **THE COURT:** All right. And so based on that, does

1 that not then trigger the Unconstitutional Conditions Doctrine?

2 **MS. RICCHIUTO:** If Indiana University is doing  
3 something unconstitutional, which we believe they are not.

4 **THE COURT:** Right.

5 And so answering "yes" to that question merely gets  
6 us to then defining the right and deciding under which tier of  
7 scrutiny we're going to analyze this constitutional question.

8 But it still gets us back to this idea that, well,  
9 they can just attend somewhere else simply begs the question  
10 ultimately of: Has IU done something that meets rational basis  
11 review, at least as the university would pitch it to me?

12 Do you agree?

13 **MS. RICCHIUTO:** Yes.

14 **THE COURT:** Okay. So that's the real question we  
15 have to answer here, not whether they can just simply go  
16 somewhere else. Has the university done something rational to  
17 achieve a legitimate end?

18 **MS. RICCHIUTO:** Correct.

19 **THE COURT:** Which then leads me back to my original  
20 question and how we got here, which is: If these medical  
21 questions have not been answered in the EUA process, the risk  
22 of women who -- you know, a risk to their fertility, the risk  
23 of having children, perhaps other risks that we don't yet know,  
24 if those things haven't yet been established, on what medical  
25 basis, on what rational basis, has the university said, in its

1 infinite wisdom, "We don't care what the science will  
2 eventually say is the risk in the future. Today, we're going  
3 to mandate that our students get the vaccine, nonetheless"?  
4 Why is that rational?

5 **MS. RICCHIUTO:** I don't agree that Indiana University  
6 doesn't care what happens to its students now or ever.

7 I think that Indiana University is making decisions  
8 based on very, very, very robust federal guidance about the  
9 safety and the efficacy of the vaccines. Do they know every  
10 single thing? No. No one knows every single thing.

11 But is it reasonable for them to take guidance from  
12 the federal government that says, "Hey, IHEs, colleges, you are  
13 a place where" -- "you are a prime ground for control of COVID  
14 or spread of COVID. Here are tools that are at your disposal.  
15 The very most effective one is vaccine," I believe that it is  
16 eminently reasonable for IU to make the decision to implement  
17 that to the fullest extent that it can in an effort -- coupled  
18 with its compelling, at least, legitimate interest in the  
19 safety and health of its students, faculty, and staff.

20 **THE COURT:** Are there any exceptions to the masking  
21 requirement? So for those students who receive exemptions and  
22 have to comply with the additional requirements, masking,  
23 social distancing, and surveillance testing, are there any  
24 exemptions to that?

25 In other words, as an example, do athletes have to

1 wear masks when they're on campus and competing in sports?

2 **MS. RICCHIUTO:** If athletes are not vaccinated and,  
3 for example, in a classroom environment, just because they're  
4 an athlete, they're not exempt from masking. I'm confident  
5 that athletes are probably highly encouraged to --

6 **THE COURT:** What if they're on the football field?  
7 If they got an exemption and they're on the football field,  
8 does the running back who chooses not to get the vaccine and  
9 applies for, gets an exemption, does he have to wear a mask  
10 while he performs on the football field?

11 **MS. RICCHIUTO:** I don't believe that information is  
12 in the record, one way or the other, Your Honor. I haven't  
13 seen it stated, you know, as a written exemption, so I don't  
14 know exactly how athletes are treated.

15 **THE COURT:** So, so far as you know, the policy of  
16 Indiana University for this Fall is, if you have an exemption  
17 and you're on campus, you must wear a mask?

18 **MS. RICCHIUTO:** Not in every circumstance, no. If  
19 you're in your dorm room by yourself, if you're outside and not  
20 near people. It's a little bit more nuanced than that. But in  
21 general, unvaccinated people, who are mixing and interacting  
22 with others, the policy says they need to be masked.

23 **THE COURT:** One of the students, of course, had a  
24 concern in her deposition, as I read it last night, about her  
25 ability to perform musically and whether there would be any

1 exception at all to that.

2 What's IU's plan in that regard?

3 **MS. RICCHIUTO:** That plaintiff has an exemption so  
4 she will not be vaccinated. She will be required to mask.

5 **THE COURT:** Even while she sings? When she does her  
6 recitals, she's got to mask up?

7 **MS. RICCHIUTO:** I believe she plays the organ.

8 **THE COURT:** Oh.

9 **MS. RICCHIUTO:** But, yes.

10 **THE COURT:** So as she plays the organ, she has to  
11 mask up?

12 **MS. RICCHIUTO:** That's correct.

13 **THE COURT:** All right. There's no separate recital  
14 aside from playing the organ? In other words, she's not  
15 singing? She's not performing in that respect?

16 **MS. RICCHIUTO:** I don't believe she's a singer. I  
17 think she's -- I think she's an organist.

18 **THE COURT:** All right. So at least as to what IU's  
19 plans are with respect to masking, except for some exceptions,  
20 otherwise, the intent is you must wear a mask at all times  
21 while on campus?

22 **MS. RICCHIUTO:** Subject to exceptions, yes. In  
23 general, yes.

24 **THE COURT:** Who decides those exceptions?

25 **MS. RICCHIUTO:** They are in the restart report, and I

1 think they're -- you know, that's part of -- kind of skipping  
2 ahead, Your Honor, we obviously don't think that we should be  
3 talking about narrow tailoring. We don't think that this is a  
4 strict scrutiny case. But one of the indicia that this is  
5 narrowly tailored is that, for example, everybody is not  
6 required to mask. The guidance is, if you're unvaccinated, you  
7 should be masking. I noticed that that's the rule of the  
8 courthouse. People don't always comply with that unless  
9 they're required to, and so --

10 **THE COURT:** Maybe even today.

11 **MS. RICCHIUTO:** -- and so IU is implementing policies  
12 designed to keep the people who are most at risk from COVID  
13 safe from COVID, and the reality is that those people are the  
14 unvaccinated. They can also impact others. But the policy is  
15 not just to protect the -- you know, the desire is to protect  
16 the IU community as a whole, again not City of Bloomington, but  
17 students, faculty, staff, people on the Indiana University  
18 campus.

19 Your Honor, you may say you don't want to hear us say  
20 this anymore. We really believe that this case only challenges  
21 the vaccine requirement.

22 And the only other thing I want to say --

23 **THE COURT:** You're right.

24 **MS. RICCHIUTO:** Well, the only other thing, if you'll  
25 just indulge me one point on that, the reason why that matters

1 to us is it's not a gotcha of, like, you didn't write your  
2 papers right. The way that it's been pled, it was focused on  
3 vaccines. Now they say, "Well, it's vaccines and masking and  
4 testing."

5 Well, there's a whole bunch more to the policy. So  
6 are they asking you to throw out the whole policy and have IU  
7 be the only organization in modern times that has no COVID  
8 policy? Are they only asking you to throw out these few  
9 things?

10 So that's why we're focused on that, and that's the  
11 last thing I'll say about that.

12 You can skip on ahead.

13 We've talked about standing. Let's go ahead.

14 With respect to the scrutiny, Your Honor, which is,  
15 you know, for us, the prime decision that you've got to make, I  
16 think that you called **Jacobson** sort of kind of the precursor of  
17 rational basis. The standards seem awfully similar when you  
18 read them, but **Jacobson** does provide limits. **Jacobson** does  
19 provide limits. So we think that, technically, as a matter of  
20 precedent, **Jacobson** still controls.

21 And I wish that **Buck v Bell** hadn't been decided  
22 either. But what the authority is is not that if a case that  
23 nobody likes, cites a case that's still good law, you know, the  
24 first case is thrown out. That's not how the authority works,  
25 and we've got cases cited to that effect.

1                   **THE COURT:** So answer me this. Help me with the  
2 interesting legal question here. I realize the case is much  
3 bigger than this. But as we think about the right shape of the  
4 law, is **Jacobson** rational basis by any other name before  
5 rational basis was recognized as one of the tiers of scrutiny,  
6 or does it stand on its own and deal with situations in which  
7 there is a public health crisis?

8                   **MS. RICCHIUTO:** Certainly the cases that rely on  
9 **Jacobson**, all the school vax cases, those are not  
10 pandemic-specific. Those are regular old, you know, "I don't  
11 want my kid to get vaccinated to go to school," and there are  
12 lots and lots and lots of those. So, to me, that undermines  
13 this idea that **Jacobson** is an emergency pandemic-specific case  
14 because it has been relied on so broadly for non-emergency.  
15 It's been relied on for flu shots. It's been relied on for,  
16 you know, every-day shots. So I don't -- if that's what you  
17 mean by "standing alone," then --

18                   **THE COURT:** So suppose the Secretary of Health and  
19 Human Services were to rescind the announcement of a public  
20 health crisis. At that point, do the underpinnings to IU's  
21 policy fall away in such a way that they must rescind their  
22 policy?

23                   **MS. RICCHIUTO:** I don't believe so, Your Honor, and  
24 the reason why is because just the end of the current public  
25 health crisis does not say anything about the efficacy or the

1 safety that is provided by vaccines.

2           If they came out and said, "Oh, my gosh. We've  
3 changed our minds. Nobody should be getting vaccinated  
4 anymore," and IU said, "No. Everyone at IU is getting  
5 vaccinated," then I think you're looking at some tension that  
6 may not be tenable.

7           But the fact that we are all hoping and praying that  
8 this pandemic -- we're going to reach a day where someone who  
9 is wiser than I am says "it's over" is not a reason not to  
10 control for it with every tool that we have today.

11           So when it comes to -- so these are some of the  
12 cases, Your Honor, that I had cited about -- you know, they're  
13 just kind of run-of-the-mill school vax cases. You'll see  
14 those in your dec. These are a couple of cases that stand for  
15 the principle that I just gave you, which is, respectfully,  
16 Your Honor, it's not your prerogative necessarily to pick and  
17 choose which Supreme Court precedent you're fond of or not, and  
18 the Seventh Circuit has recognized that, and certainly the  
19 Supreme Court has recognized that.

20           We believe that this is your standard. For you to  
21 disregard **Jacobson**, you would have to be very sure that the  
22 Supreme Court was going to do that. And quite to the contrary,  
23 I think we can be very sure that they're not, because the cases  
24 that plaintiffs rely on don't go that far. Setting aside  
25 **Buck v Bell**, these are First Amendment cases. They are

1 certainly COVID Supreme Court cases. They are First Amendment  
2 cases that either don't have majorities or the majority finds  
3 one thing but the dissent finds something else. They're not  
4 Fourteenth Amendment cases. They're not mandatory vaccine  
5 cases. And several of them say really nice and helpful things  
6 for IU.

7 For example, in **Roman Catholic Diocese** -- and this is  
8 the case that I think that plaintiffs would say is kind of  
9 their main case -- that's a First Amendment case, not a vaccine  
10 case. The only substantive analysis of **Jacobson** in that case,  
11 Judge, is in the concurrence. So there is no substantive  
12 analysis of **Jacobson** anywhere but there. The per curiam  
13 doesn't cite **Jacobson**.

14 This was a First Amendment injunction based on church  
15 restrictions where, you know, you could have unlimited people  
16 in the shopping mall, but very few in the church. And in the  
17 concurrence, they walk right through. This is very different,  
18 and it cautions against applying **Jacobson** in First Amendment  
19 cases.

20 We don't disagree, Your Honor. We're not standing  
21 here -- I'm not standing here asking you to apply **Jacobson** to a  
22 First Amendment case. I'm asking you to apply **Jacobson** to a  
23 case that is squarely on point with **Jacobson**, which is a  
24 Supreme Court case that hasn't been overturned.

25 The other things that --

1                   **THE COURT:** What about the masking, the additional  
2 requirements? Because, of course, the students are challenging  
3 this on a First Amendment basis. So what is your view in terms  
4 of how I analyze that portion of the policy? Is that **Jacobson**  
5 or something else then?

6                   **MS. RICCHIUTO:** I'm not sure that we agree that they  
7 have a First Amendment challenge to masking.

8                   I know that, every once in a while, Mr. Bopp says  
9 "free exercise," but they don't have a First Amendment claim in  
10 this case, Judge. They have one count, and it's for  
11 substantive due process.

12                  The concurrence in **Roman Catholic** confirms that  
13 **Jacobson** applied the right standard for the circumstances. It  
14 confirms that **Jacobson** met rational basis and says it may even  
15 have survived strict scrutiny. It also confirms that the issue  
16 there did not constitute a serious and long-standing intrusion  
17 into settled constitutional rights.

18                  And let's remind ourselves, **Jacobson** was criminal.  
19 This is not -- the circumstances with IU are certainly far  
20 short of throwing people in prison if they do not get  
21 vaccinated.

22                  Applying **Jacobson** is not disregarding the  
23 Constitution, Your Honor, or even disregarding rational basis.  
24 It is applying the correct standard for the claims that  
25 plaintiffs have brought. So it doesn't require you to make a

1 finding one way or another about whether the pandemic is close  
2 to over, right in the middle. We don't believe that that's a  
3 finding that you have to make to decide this case. **Jacobson**  
4 applies even if there's disagreement among the parties or even  
5 experts about efficacy, validity.

6 I mean, it was very striking to me to read **Jacobson**  
7 and see such a lengthy discussion of basically the disagreement  
8 about the science at that time, right, concerns that maybe the  
9 vaccine wasn't as efficacious as some thought, concerns about  
10 possible side effects. I mean, we're talking about 1904. It  
11 was the same conversation. And what the Court found there was  
12 that the minority doesn't get to dictate the policy for the  
13 policy makers, that the policy makers are entitled to take in  
14 the information that's available to them, make decisions about  
15 the way that they are going to -- you know, govern isn't  
16 exactly right, but, you know, the policies that the people they  
17 are policy makers for are going to be subject to.

18 And the Chief Justice, in another one of his  
19 opinions, cautions against, you know, you sort of feeling like  
20 you have to take on the burden of deciding exactly on, you  
21 know, what's the precise risk of myocarditis or what's the  
22 precise risk of long-haul COVID, which there's lots of  
23 testimony that students this age, they don't necessarily die,  
24 but they get long-haul COVID, and the long-term symptoms of  
25 that are not known. That's something else that's in the record

1 as a serious concern for IU.

2                   And then I think the briefing may say that we don't  
3 have authority after **Roman Catholic**, applying **Jacobson**, and so  
4 these are just a couple of examples of authority that does do  
5 that.

6                   So absent **Jacobson**, if you determine, for example,  
7 Your Honor, that that is limited to its facts or only applies  
8 in a pandemic, then unquestionably we are at rational basis  
9 scrutiny. There is no fundamental right that is actually  
10 implicated by the vaccine requirement, and that is because of  
11 the conversation that we had about these plaintiffs having a  
12 choice.

13                   Now, these particular plaintiffs, all except for one,  
14 are exempt on the vaccine. But even more broadly, there is  
15 absolutely a choice, albeit possibly a difficult choice, that  
16 these plaintiffs have. No one is forcing anything to go into  
17 their bodies. No one is -- I think their brief talks about  
18 organ harvesting or sterilization. I mean, these are not --  
19 those are very false equivalents, Your Honor.

20                   **THE COURT:** It's still rather coercive, though,  
21 particularly with respect to the Ph.D. student who is on the  
22 eve of obtaining two Ph.Ds, right?

23                   **MS. RICCHIUTO:** She has an exemption so she is not  
24 required to be vaccinated, and her testimony at her deposition  
25 was that she most likely would attend IU regardless of the

1 status of the injunction.

2 So these are the fundamental rights. Some of them  
3 Mr. Bopp talked about today. Some of them, you know, we really  
4 tried to look through their papers and see which were the ones  
5 that we thought they were claiming, and none of them are  
6 implicated for the very, very, very important fact that these  
7 students have a choice about whether to be vaccinated.

8 Masking and testing, that's already been decided,  
9 whether those implicate fundamental rights. We've got cases in  
10 our briefs, and here there's the masking case, the testing  
11 case. I don't know that I've heard him contend that those  
12 are -- again, in the due process context, Your Honor -- that  
13 those are strict scrutiny, but I think that those arguments  
14 have already been disposed of.

15 So in the absence of a fundamental right, you know,  
16 you are contending with rational basis analysis. We believe  
17 that we could meet strict scrutiny. IU's interests are  
18 compelling. The Supreme Court has said that COVID is  
19 unquestionably a compelling interest. They're continuing to,  
20 you know -- right up to the Judge Hamilton decision, the  
21 Seventh Circuit decision that plaintiffs rely on, that was in  
22 March, and that continues to describe COVID as, you know, very  
23 deadly and a serious concern.

24 Again, whether or not you -- you don't have to decide  
25 specifically where we are in the life span of the pandemic. To

1 your point earlier to Mr. Bopp, no one in any authoritative  
2 position has said that it's over. The federal government  
3 hasn't said that it's over.

4 I think policy makers all around are changing  
5 restrictions as they have throughout this entire pandemic to  
6 try to best meet the needs of their constituents. But the fact  
7 that there are double the cases in Indiana than there were just  
8 on July 6th tells us that the pandemic is not over. So I think  
9 the issue of IU having a compelling interest, and then  
10 obviously certainly a legitimate interest, should not be  
11 subject to much dispute.

12 I think you pointed out that Governor Holcomb also  
13 again made -- these are observations, right -- but that 98.5  
14 percent of new cases are with unvaccinated individuals. So IU  
15 has a very, very, very reasonable interest in minimizing the  
16 number of unvaccinated individuals that it has in its  
17 community, not eliminating. It's not going to be zero. They  
18 can't -- they're not going to get to 100 percent vaccination.  
19 They haven't set -- you know, they have religious exemptions.  
20 They have these medical exemptions. They're doing it as  
21 narrowly as they can while absolutely encouraging as much  
22 vaccination as they can accomplish. And Dr. Carroll, you know,  
23 testified to that very clearly.

24 IU also has, you know, a very wide range of data that  
25 it has considered about the safety, the efficacy, the amount of

1 testing. Dr. Beeler has lots of testimony on that and all the  
2 things that they considered.

3 We also have, when it comes to tailoring, the federal  
4 guidance. And then, as I pointed out, Your Honor, this issue  
5 of, you know, everybody is not getting tested everyday, right.  
6 Regardless of whether you're vaccinated, they're not saying,  
7 "Every single person tested for COVID everyday. Everyone has  
8 to wear a masking while they're sleeping. Everyone has to have  
9 three doses of the vaccine instead of the mandatory two."  
10 They're adhering as closely as they can to what the guidance  
11 is, given that the other piece of the guidance is, unvaccinated  
12 are at highest risk. Vaccine is the strongest tool that we  
13 have. That is unquestionably -- that's unquestionably  
14 reasonable.

15 So then we get to irreparable harm. From our  
16 perspective -- although the constitutional analysis might be  
17 more intellectually interesting for all of us -- we also  
18 believe that they just cannot meet the standard of irreparable  
19 harm.

20 Ms. Sperazza, again, is the only plaintiff who  
21 potentially has a problem with the actual vaccine requirement.  
22 Of course, IU is not interested in having her leave the school,  
23 and they would love to have her remain a student, but the  
24 **Hodges** case talks about her choices. The exempt plaintiffs  
25 certainly don't have irreparable harm.

1 Speculative concerns about future events. So there's  
2 some testimony that you may see in the depositions about  
3 concerns about segregation or discrimination or, you know, "My  
4 professor won't be able to hear me" or "No one will want to be  
5 my friend." You know, certainly we hope that none of those  
6 things happen. We don't have any expectation that they will  
7 happen. But as of today, those are speculative and  
8 hypothetical, and they are not irreparable.

9 Also, there are several students who -- because let's  
10 remember, a lot of these students are past freshman, so they  
11 were at school, last year, you know, masking all the time and  
12 testing very routinely. And none of them -- we asked them  
13 about all of that in their depositions, and none of them  
14 claimed any ongoing harm from the testing that they did.

15 Ms. Sperazza even testified that, at one of her jobs,  
16 she could take a break from her job if she would volunteer to  
17 get COVID tested, and she did that three or four times just to  
18 have some time off work. So the idea that they have -- not  
19 everybody has had a COVID test. But the ones that have had  
20 COVID tests, some of them have had many. And that you would  
21 voluntarily submit to it for other reasons and then say, "But,  
22 no, when I'm in Bloomington this Fall, it's irreparable harm,"  
23 the law just doesn't bear that out.

24 There's this concern about timing. Will the students  
25 get to choose, you know, kind of when they get tested? There's

1 not a set schedule about how often they'll be tested. So all  
2 of that falls under, you know, either speculative or  
3 inconvenient or both. Neither of those are irreparable.

4 And we -- this is on our Exhibit 320, Your Honor --  
5 321. Excuse me. We have some charts that we thought might be  
6 helpful to you or your clerks that talks about all of the  
7 relevant testimony from the plaintiffs specific to the basis  
8 for their objection, so what type of objection do they have;  
9 what's their alleged harm from masking and testing, again  
10 including the extra requirements; and then how often had they  
11 done that in the past.

12 There are no plaintiffs in this case, Your Honor,  
13 that have never worn a mask. There are no plaintiffs in this  
14 case, Your Honor, who have testified to any type of like  
15 medical injury or ongoing irreparable harm based on wearing a  
16 mask. So it really just comes down to "I've done it everywhere  
17 I've been required to do it" -- or sometimes not. You know,  
18 some of them were candid and said, "I don't comply with masking  
19 requirements" -- "but when I get to IU, I shouldn't have to do  
20 it. And not only should I not have to do it, that's  
21 irreparable," and we don't think that that's an adequate  
22 showing of irreparable harm.

23 If you look at plaintiffs' reply brief, they don't  
24 particularly try to dispute any of these specific pieces of  
25 testimony about whether there's been harm. They ask you to,

1 instead, presume harm. Obviously, that's a little bit -- we've  
2 had a couple of different conversations today that felt a  
3 little circular or begging the question, but we think that this  
4 is one.

5 Irreparable harm has been presumed in certain type of  
6 constitutional cases, First and Second. It's not been presumed  
7 in a case just like this where it's substantive due process on  
8 some basis that's not, you know, actual incursion into bodily  
9 integrity.

10 So if IU were lining everybody up, you know, and  
11 giving them vaccines against their will, that would be a  
12 different set of facts. That's not what we have here.

13 So the law doesn't permit you to just presume  
14 irreparable harm here. And, in fact, this **Campbell** case, which  
15 is a Seventh Circuit case, it really urges you to not be sort  
16 of overbroad about assuming irreparable harm just because  
17 there's been a constitutional claim.

18 You know, sort of in the back of our head, we think,  
19 "Well, if it's Constitutional, maybe there's some kind of  
20 presumption," and that's not exactly what the law says. There  
21 can be, for example, money damages available in the context of  
22 a constitutional harm.

23 So, then, again, if we get this far, Your Honor, then  
24 we get to the balance of harms and the public interests. What  
25 the Seventh Circuit says in that **Cassell** case, the Judge

1 Hamilton case that's pretty recent, that affirms denial of an  
2 injunction. I think Illinois, "stay at home." That's a First  
3 Amendment case.

4 Just as an aside, it does not actually say that  
5 **Jacobson** doesn't apply to substantive due process. It does  
6 acknowledge that maybe things are -- the winds are starting to  
7 change when it comes to the First Amendment. We don't think  
8 that that's a thing that you have to concern yourself with for  
9 purposes of this analysis.

10 But what's really compelling about this opinion is  
11 that it takes into account more than just the plaintiffs. So,  
12 how -- and, again, when it comes to the vaccine itself, we're  
13 just talking about one plaintiff, Your Honor. So you're  
14 talking about one plaintiff, who would prefer not to get  
15 vaccinated, has the option not to get vaccinated and to go on  
16 and have a very happy and successful life, not having gotten  
17 vaccinated, and weighed against the body of IU's community as a  
18 whole, including lots of people who don't get to make a choice,  
19 people who are immunocompromised who really cannot get  
20 vaccinated and maybe would prefer to, people who have family  
21 members who are at risk.

22 And what this **Cassell** case talks about is the concept  
23 of personal choice when that personal choice increases risks  
24 for others. It's one thing to make a decision about what I  
25 want to do with my body when there's no way that what I do with

1 my body can impact other people. What Cassell says is this is  
2 something different. You do have a choice about what to do  
3 with your body. But when it comes to an analysis like this, we  
4 also get to take into account, your choice about your body,  
5 what impact that might have on other bodies, and there's this  
6 nice line about "COVID can sicken and kill those who did not  
7 consent to the trade-off," so that's not to minimize these  
8 plaintiffs' right to decide that they don't want to be  
9 vaccinated.

10                   **THE COURT:** Doesn't that draw an interesting  
11 distinction, then, between what the students are characterizing  
12 as the bodily autonomy cases in **Cruzan** and **Glucksberg**? If  
13 **Cruzan** is about denying unwanted hydration and nutrition, and  
14 **Glucksberg** is about, you know, any right to assisted suicide,  
15 do you view those cases as necessarily looking at an individual  
16 right without repercussion or ripple effects to the greater  
17 community?

18                   **MS. RICCHIUTO:** I think that's right, Your Honor. I  
19 mean, they also, you know, sort of deal with the inverse,  
20 right, where it's my right to not have treatment. And here I  
21 think plaintiffs would say, "You're requiring us to get medical  
22 intervention that we don't want."

23                   But that's exactly right. I mean, someone who  
24 decides to end their life medically, obviously, undoubtedly,  
25 that has an impact on their friends and family -- and, you

1 know, I don't mean to say that that life is not important --  
2 but it does not cause all the people in their house or in their  
3 school or in their class or in their dorm room to fall ill.  
4 And so that is an important distinction here when it comes to  
5 the balance of harms, and that is what the analysis is in this  
6 Seventh Circuit **Cassell** case, which is, again, I think, from  
7 March of this year, that we think is really instructive on the  
8 balance of harms.

9 Aaron Carroll -- Dr. Aaron Carroll's declaration and  
10 his testimony, IU's goal is this: They are trying to get as  
11 close to normal as they can safely get for their constituents.  
12 And based on very, very, very considered and robust analysis,  
13 they have concluded that this is the very safest and most  
14 reasonable way to do that.

15 So I know my time has expired. I appreciate your  
16 attention, Your Honor.

17 **THE COURT:** Thank you, Ms. Ricchiuto.

18 Mr. Bopp, before you do your rebuttal, I think I'm  
19 going to take a break, if you'll forgive me and allow me. I  
20 think everyone could use a break. We've been going at some  
21 distance here at this point, so bear with me. We'll come  
22 back -- I'll come back at 4:30. We'll take a 20-minute break  
23 here, and then I'll hear your rebuttal.

24 **MR. BOPP:** Thank you.

25 **LAW CLERK:** All rise.

1 (All comply; short recess taken.)

2 MR. BOPP: I've excerpted my excerpts.

3 THE COURT: All right. Very good.

4 MR. BOPP: Thank you, Your Honor.

5 I'm going to start with a few rebuttal items.

6 I don't know why IU wants to tell you about their  
7 secret non-enforcement policy regarding the medical exemption.

8 There's two ways of looking at that. That either  
9 indicates a due process violation because they're acting  
10 arbitrarily and capriciously and granting exemptions to people  
11 that don't qualify under the written policy, or they're asking  
12 you to not address the policy itself because they don't enforce  
13 it.

14 Actually, that second thing I've litigated and won, I  
15 think, in six circuits, and that is, the fact that the  
16 administrators don't follow their own policy does not immunize  
17 the policy from constitutional challenge because, as courts  
18 would say, they could just return to the policy. In other  
19 words, at any time that they choose, arbitrarily and  
20 capriciously, they can just go back to the policy, as opposed  
21 to their secret non-enforcement policy. So their policy is  
22 still on the table.

23 Second, this position about there's something  
24 different between the mandate of the vaccination and the  
25 exemptions puzzles me. If they're right and you would, as we

1 hope, enjoin the mandate for the vaccination, well, what would  
2 the exemptions be exempting you from? I mean, it's  
3 nonsensical. They're inextricably linked, because the  
4 exemption is from the vaccine mandate. So they're not like  
5 separate policies, and nor can the exceptions stand alone  
6 because they make no sense standing alone.

7                   Third, you know, **Jacobson**'s core holding they've  
8 abandoned, and I'm glad because I think we've been arguing that  
9 this case should be litigated either under the exception that  
10 **Jacobson** recognized or under modern constitutional  
11 jurisprudence, because the central holding of **Jacobson** is that  
12 this Court has no authority to review, question, or even take  
13 evidence about policies that are adopted in the name of public  
14 health. And, of course, they affirmed the trial court, the  
15 district court, that refused to take evidence because the trial  
16 court gave the government bureaucrats cart blanche in  
17 determining what public health measures should be adopted and  
18 whether they're reasonable or whatever.

19                   Now, the exception, however, does demand that this  
20 Court decide and take evidence on whether the action taken is  
21 "reasonably required for the safety of the public," reasonably  
22 required for the safety of the public.

23                   Now, you hear nothing -- there's nothing in the  
24 record that IU applied that standard. They weren't looking for  
25 reasonable measures, because they were quite clear -- and this

1 is in the excerpts on Exhibit 206 from Carroll -- that their  
2 goal was to be as safe as possible. In other words, not adopt  
3 reasonable measures to be safe as possible, but to be as safe  
4 as possible. So they have just, you know, picked one, and it  
5 happens to be the most extreme measure, in our opinion,  
6 obviously the most rights violative, and that's what they have  
7 implemented.

8 Now, if they just can do whatever they think is safe  
9 as possible, number one, it has led them to the irrational  
10 position that they are going to impose measures until there are  
11 no or virtually no infections at all. Well, what disease has  
12 that situation? I mean, very few. A few have been eradicated,  
13 hopefully. But zero infections when these measures are being  
14 instituted in the name of a pandemic? That they are entitled  
15 to pick whatever measure takes them to zero infections? And I  
16 have excerpts here, not only -- Number 206 is what their goal  
17 was, to be as safe as possible.

18 But the next one is when they were talking about herd  
19 immunity -- in other words, when can they back off -- they  
20 said, Beeler said, "I would expect to see zero or very low, no  
21 new positive cases." "I would expect to see zero or very close  
22 to zero percent positivity in those testing with adequate  
23 testing going on." That's when they're going to back off the  
24 mandate, when there's zero.

25 Now, it is true -- or virtually zero. Now, it is

1 true that Carroll acknowledges that's an impossibility and all  
2 that, but that is their goal, and it's repeatedly their goal  
3 and why they have adopted these measures. They didn't measure  
4 this on the basis of reasonableness or rationality. They  
5 measured it on the basis of: Our goal is to be as safe as  
6 possible to get to zero or to virtually zero.

7 So that answers your question. When are they going  
8 to back off? Never, never, because they'll always have a  
9 justification because there will very likely always be COVID  
10 infections out there, at least one or a dozen or maybe a few  
11 hundred or whatever.

12 Now, you know, their position -- you brought up the  
13 question of the HPV vaccine. And, of course, their position  
14 would be on that, "Well, we're entitled to do what is the most  
15 effective means for public safety," most effective means, not a  
16 reasonable means but most effective means for public safety.

17 Well, why just do the vaccination? Why not prohibit  
18 anyone that is HPV positive from having sex? Because it is  
19 transmitted that way. So if they get cart blanche authority  
20 and it's not judged by true reasonableness, evidentiary-based  
21 reasonableness when you have to make a decision that the  
22 current situation justifies it, well, then, they just have cart  
23 blanche to do all sorts of things.

24 Now, that takes me to Exhibit 319, and these are  
25 those graphs that they had up on the screen. You know,

1 everything like this pandemic goes up and down day-to-day. You  
2 know, there's more cases one day and fewer cases the next day  
3 and bam, bam, bam, bam. So what you do is you look at the  
4 trend line. You don't do what they did, pick out three days in  
5 this graph and say, "The cases are going up," three days in a  
6 pandemic that has lasted for a year-and-a-half. No. She  
7 didn't show you the trend line, and we have that in our  
8 evidence.

9 You also -- if you really want to understand what is  
10 happening, you also don't do what they did in the second graph,  
11 all right, that has this long sloping thing down and long  
12 sloping up.

13 This side of the graph is -- the top is not 100  
14 percent. The top is 4 percent. And then to make it bigger,  
15 they have 3.5 and 3. So they even went to the .5 to make that  
16 larger, okay, so that the slope looks bigger, all right. And  
17 then from here to here (indicating) is within 1 percent. That  
18 whole line is within 1 percent on that graph, all right. And  
19 the part where this part goes up is two weeks in an infectious  
20 disease that has been going on for a year-and-a-half.

21 And what? What? They're going to make long-term  
22 policy, you know, consider here mandating a vaccination for an  
23 entire semester? They're going to justify that based on what  
24 happened in three days or over two weeks that was less than a 1  
25 percent increase, less than a 1 percent increase?

1                   This line, if you would normally graph it, it would  
2 be way down there, okay. And everybody would look at it -- you  
3 know, you'd have 100 percent down to zero percent, and you'd be  
4 right down here -- and they would say, "Well, whatever," okay.

5                   So these, unfortunately, don't really help the  
6 decision because you have to look at the overall progress of  
7 the disease, which takes me to Exhibit 222, all right. This is  
8 the graph of the progress of the disease with respect to  
9 positive cases, all right.

10                  You see way down here on the right, way down at the  
11 bottom, that's where this is, all right. And anyone looking at  
12 this chart would say, "Wow, have things changed," you know.

13                  At the height, there were 5,628 positive cases a  
14 day, all right. And by July 8<sup>th</sup>, there's 395. That is an  
15 86 percent decrease in the number of cases. And we are down  
16 toward, you know, a stabilization, if you will, of the numbers.

17                  Now, everybody that talks about dealing with  
18 pandemics always says that things could change and things could  
19 happen in the future, and there's no question about that. And  
20 that, to a certain degree, they're all different, to a certain  
21 degree. But that doesn't invalidate the whole idea -- and now  
22 I'll go to 229 -- of IU's policy.

23                  They adopted this policy. They say, "The purpose of  
24 this document is to provide guidelines for the response to a  
25 wide variety of infectious disease threats to Indiana

1 University." So it's not limited to the flu or something like  
2 that. They want to give thoughtful, advanced guidance on how  
3 we're going to look at these problems and deal with them, all  
4 right.

5 **THE COURT:** This is the policy that existed prior to  
6 the COVID policy, right?

7 **MR. BOPP:** Yes, because it was adopted for any  
8 infectious disease threat, okay.

9 And the evidence is they didn't -- in the report,  
10 they didn't cite it. They didn't quote it. They didn't  
11 analyze it in accordance with the policy.

12 And even though there was, you know, some quibbling,  
13 I think a fair reading of Dr. Carroll's answer, numerous  
14 answers on this one question, "Did you talk about it," was they  
15 didn't even talk about. In other words, they did it ad hoc as  
16 if this was *sui generis*, and it's not, all right.

17 You turn to the next exhibit, 212. These are the  
18 levels, all right. And each level requires a different policy  
19 response. And if you go -- and this was attached to the  
20 policy. This is attached to the policy, all right, and  
21 referred to in the policy. If you go to the far right side,  
22 you see "recovery". And then you see -- under "warning and  
23 threat," you see -- first you see a reference to "WHO," then  
24 "U.S. 6." But then you see "CDC deceleration" and "CDC  
25 preparation."

1                   Those are references to a CDC publication that, just  
2 like this policy -- and they're using the CDC -- established  
3 how you are to deal with infectious diseases, all right.

4                   Now, I'm going to reserve this one for one second and  
5 go to the next one, the chart, Exhibit 230.

6                   This is the CDC chart on the progress of infectious  
7 diseases. It's a bell curve, right. And if you turn back to  
8 what happened with respect to COVID, that's a bell curve. And  
9 they look very similar, don't they?

10                  Well, they have come to understand that when you are  
11 in different phases of a pandemic, then you will have a  
12 different response. And they have named the phases here, all  
13 right: Investigation, recognition, when it's just starting  
14 off, just starting off; then acceleration; initiation when it  
15 begins it's upward trajectory; then acceleration when it really  
16 goes up fast, right there. You get to the top. Then you have  
17 deceleration, and then it levels off into preparation.

18                  Now, they tell you you're supposed to do different  
19 things at the different phases. And looking at their chart, if  
20 we're not at least in the middle between deceleration and  
21 preparation, then we're in preparation. We're certainly at the  
22 end of deceleration if we're even -- if we haven't passed it,  
23 all right, in terms of the graphing of the pandemic.

24                  Now, going back to Exhibit 231, they tell you what  
25 you're supposed to do, okay. And they say -- on the second

1 page, here's deceleration, all right. This is the deceleration  
2 intervals indicated by a consistently decreasing rate of  
3 pandemic, influenza cases -- and they use that as an example --  
4 in the United States. And that's, of course, exactly what we  
5 see there in the deceleration phase.

6 "During this interval, planning for appropriate  
7 suspension of community mitigation measures and recovery  
8 begins."

9 No, deceleration isn't the time to whip on some  
10 massive regulation like forcing everybody to be vaccinated.  
11 No. It's the time for suspension of mitigation measures  
12 because of recovery and plan for recovery to begin.

13 Then, preparation, which is the next phase, the  
14 leveling off at the end phase. It says, "Primary actions focus  
15 on discontinuing community mitigation measures."

16 They're no longer justified. That's why the  
17 situation matters. They want you to pretend that this doesn't  
18 happen and all we're supposed to do is add up all the deaths.  
19 And I suppose the more deaths, the more Draconian they can be,  
20 even though we're in the final stage of the pandemic. We're in  
21 the final stage where the risk of death -- well, risk of  
22 infection, of death, of everything, has now gone down at least  
23 85 percent. One of the exhibits we present to you says  
24 95 percent from the CDC. It says 95 percent it has gone down  
25 from the top, all right.

1 And in those -- and so -- and that is why --

2 **THE COURT:** So, Mr. Bopp, let me question you on  
3 these intervals that are set out here. There's the  
4 deceleration interval and then the preparation interval.

5 Deceleration interval is defined as when no new cases  
6 are occurring or are occurring infrequently. The preparation  
7 interval, at least as stated in this exhibit, is when a  
8 pandemic is declared ended, when evidence indicates that  
9 influenza worldwide is transitioning to seasonal patterns of  
10 transmission.

11 Today, are we in either one of those circumstances?

12 **MR. BOPP:** Yes. In fact, we are in -- we are just  
13 reaching seasonal -- the seasonal burden of influenza. Look at  
14 Exhibit 259. This is the estimated burden of -- the burden  
15 historically of influenza, seasonal influenza, in the United  
16 States per year, all right.

17 I didn't put it with my excerpts of my excerpts, but  
18 Exhibit 258 has the information on July 9th, in terms of the  
19 7-day average of deaths per day, okay, which is now down to 154  
20 per day. If you multiply that by 365 to put it into a yearly  
21 basis, all right, it would be 56,210. That is under the worst  
22 seasonal influenza we've had.

23 Now, I'm not saying we should declare it over. I'm  
24 not saying that. This chart is pandemic intervals. It's not  
25 like -- preparation is not you're no longer in the pandemic.

1 You're just in a much different phase. And that phase, they  
2 say, logically, means because all the risks and consequences  
3 and spreads and all that has ameliorated so much that you can  
4 start lifting these restrictions. That's what everybody is  
5 doing. They're not being crazy, you know.

6 **THE COURT:** All right, Mr. Bopp. I think your time  
7 has run. I have a couple questions before you sit down, if I  
8 might.

9 Thank you for your rebuttal, first of all.

10 We haven't addressed this today in argument, thus  
11 far, but I want to make sure that you understand the students'  
12 position. Aside from the constitutional issue, there is the  
13 issue of Indiana's anti-passport law, if I can fairly  
14 characterize it as such.

15 **MR. BOPP:** And we've withdrawn that claim.

16 **THE COURT:** You have withdrawn that?

17 **MR. BOPP:** Yeah.

18 **THE COURT:** Okay. So I need not decide anything  
19 related to that?

20 **MR. BOPP:** No. In our footnote, we said we hadn't  
21 thought of the question of a private cause of action. We  
22 researched. I don't think we said that, but we did research  
23 it. We hadn't thought of it, and we did research it, and we  
24 decided IU is correct on that.

25 **THE COURT:** All right. That was one of my questions,

1 and thank you for that clarification.

2                   Second, is there not something rational about the  
3 university's concern that the additional requirements won't  
4 prove enough; in other words, that it won't stem the tide of  
5 any pandemic that may linger, that students won't comply, that  
6 it's a difficult policy to police?

7                   **MR. BOPP:** Yes.

8                   **THE COURT:** Now, for instance, just as an example,  
9 the policy of this federal building is that anyone who is  
10 vaccinated need not wear a mask; whereas, anyone who is not  
11 vaccinated is supposed to wear a mask in this courtroom and in  
12 this federal building. And we have followed, and I follow, the  
13 honor system whereby people do what they're supposed to do in  
14 terms of how they conduct themselves, not just in this  
15 courtroom, but in the federal building.

16                   If there are people in this federal building,  
17 including in this courtroom, who are not vaccinated and who  
18 should be wearing masks, according to the policy that this  
19 federal court has implemented, is that not judicial notice or a  
20 basis for me to take judicial notice that perhaps the masking  
21 additional requirements and other additional requirements that  
22 the university has in place won't prove enough for the safety  
23 of the campus this Fall?

24                   **MR. BOPP:** Well, if it doesn't, then they have a  
25 basis to take action.

1                   And if you look at the last page of Exhibit 231, in  
2 the preparation stage, one thing you're supposed to do is --  
3 well, it's defined as low pandemic influenza activity, but  
4 continued outbreaks possible, okay, and you're supposed to plan  
5 for those, all right.

6                   **THE COURT:** But my question is: Isn't there  
7 something rational about the university's position or belief  
8 that the additional requirements, while they may be  
9 well-intended for those who are exempted, nonetheless, won't be  
10 enough come this Fall, because, like it or not, even when  
11 there's a requirement to wear masks when you're not vaccinated,  
12 people will flout the rules?

13                   **MR. BOPP:** No, because that's not evidence-based.  
14 That's speculation, you know.

15                   **THE COURT:** Is it speculation in this courtroom right  
16 now?

17                   **MR. BOPP:** Well, I don't want to comment on that, but  
18 I -- but, you know, you can't strip away people's rights on the  
19 basis of speculation. You know, you have to have adopted a  
20 reasonable measure that's evidence-based.

21                   In the preparation phase, which I believe we are in  
22 here in Indiana and the United States and certainly at IU, I  
23 mean, herd immunity, according to their question and answers,  
24 is a majority vaccinated, majority.

25                   Beeler kind of raised the bar in his deposition. He

1 said 60 to 80 percent. Well, 75 percent of IU students are  
2 vaccinated. So by their own definitions, we've reached herd  
3 immunity. And, of course, they don't even take into account  
4 people that are naturally immune because of infection.

5 But you are -- in the preparation phase, you are to  
6 substantially reduce your mitigation measures, which is another  
7 way of saying "take off restrictions that violates people's  
8 rights because they're no longer justified by the level of the  
9 pandemic, but get ready for another outbreak. And when you see  
10 that coming, then you take additional measures."

11 And of course you do. I mean --

12 **THE COURT:** All right, Mr. Bopp. I think I've got  
13 your point.

14 **MR. BOPP:** All right. Thank you, sir.

15 **THE COURT:** Thank you, sir.

16 All right, ladies and gentlemen. Thank you for your  
17 submissions, your written submissions. Earlier, of course, how  
18 you've organized and compiled the exhibits to ease my review as  
19 best you could, particularly under circumstances that were  
20 emergent themselves in just a short couple of weeks, that is  
21 very much appreciated by me in enabling my review.

22 Likewise, let me commend counsel for today's  
23 performance, your remarks, your responsiveness to my questions,  
24 and the nature and quality of your presentation. That also is  
25 very much appreciated. And your clients on both sides, no

1 matter the result from this preliminary injunction request,  
2 should be very happy, pleased, proud of your performance on  
3 both sides.

4 I know there is an urgency to a ruling, and I do not  
5 intend to tarry long. That being said, as anyone can see, I  
6 have stacks and stacks of paper. And I have devoted many hours  
7 already in its review, but I have more to think on and to  
8 review even after the arguments this afternoon.

9 So I won't give you a firm prediction on when to  
10 expect a ruling, but it will be very, very soon. And I  
11 understand that the parties on both sides have an interest in  
12 not just a deliberate decision but as immediate one as I can  
13 perform, so I will certainly put my full effort into this case.  
14 And I have been able to clear a couple days yet this week,  
15 notwithstanding the importance of other matters, to tend to  
16 this one, so I've allotted some time for that purpose. So with  
17 those comments, I will take the matter under advisement and  
18 hope to have a ruling out very soon.

19 That all being said, Mr. Bopp, anything else for your  
20 clients, the students, today?

21 **MR. BOPP:** No. Thank you, again.

22 **THE COURT:** Thank you, sir.

23 Ms. Ricchiuto, anything else for the university  
24 today?

25 **MS. RICCHIUTO:** No. Thank you so much for your time.

1                   **THE COURT:** Thank you. Thank you both, as well.

2 Thank you.

3                   All right. We'll stand adjourned.

4                   **LAW CLERK:** All rise.

5                   **(All comply; proceedings concluded.)**

6                   \*\*\*

7                   **CERTIFICATE**

8                   I, DEBRA J. BONK, certify that the foregoing is a  
9 correct transcript of the record of proceedings in the  
10 above-entitled matter.

11                   DATED THIS 22nd DAY OF JULY, 2021.

12                   S/S DEBRA J. BONK

13                   DEBRA J. BONK  
14                   FEDERAL CERTIFIED REALTIME REPORTER

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